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MASSACHUSETTS BAR ASSOCIATION

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ALFRED HEMENWAY, of Boston, 1910–1911.
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JOHN C. HAMMOND, of Northampton, 1912–1913.
MOORFIELD STOREY, of Boston, 1913–1914.
HERBERT PARKER, of Lancaster, 1914–1915.
HENRY N. SHELDON, of Boston, 1915–1916.
CHARLES E. HIBBARD, of Pittsfield, 1916–1917.
ARTHUR LORD, of Plymouth, 1917–1918.
JOHN W. CUMMINGS, of Fall River, 1918–1919.
FREDERICK P. FISH, of Brookline, 1919–1920.
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THOMAS HOVEY GAGE, of Worcester, 1922–1923.

OFFICERS OF THE AMERICAN BAR ASSOCIATION FOR 1923–1924.

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FOURTEENTH ANNUAL MEETING.

After the business meeting the members were the guests of the Hampden County Bar Association at lunch at the Highland Hotel.

Address of Welcome

WILLIAM H. BROOKS, ESQ., PRESIDENT OF THE HAMPDEN COUNTY BAR ASSOCIATION.

Members of the Massachusetts Bar Association:

It is a matter of great pride to the Hampden County Bar Association that you are here today as our guests. We consider that the honor you have bestowed upon us by your presence and by having chosen for the place of your meeting this year the city of Springfield, is an honor indeed. We appreciate it, because if I may so express it, you not knowing all of us, we are very appreciative folks. Anyway we extend to you a hearty greeting and an enthusiastic welcome and hope to see you again in your peregrinations about the state. I think that I can say that you will take with you upon your departure our good will, our sincere esteem and the hope that you will all live long and prosper.

Gentlemen, the utterance of these few words I would like to have you consider as the pages of a volume. I thank you for your presence and I thank you for your listening capacity.

Address of the President, Thomas Hovey Gage

Mr. President, on behalf of the Massachusetts Bar Association I thank you for your kind words of welcome and I thank the members of the Hampden County Bar Association for their generous hospitality. All the people of Massachusetts like to come to Springfield. Before the early colonists had fairly established their fringe of settlements along the shore of Massachusetts Bay, they pushed on through the wilderness to explore and enjoy the beautiful valley of the Connecticut; and in 1636 though few in numbers, feeble in strength and poor in substance, they put to their credit two great achievements: they founded Harvard College at Cambridge and settled Springfield. They early exemplified the two ruling passions of our people, education and colonization.

I imagine that when Pynchon and his associates on that early day in May chose this site for their new home, they anticipated the well-known lines of Whittier—"Along the broad Connecticut old Hampden felt the thrill."

The report of your Executive Committee and the discussion at the meeting this morning indicate the problems which are interesting the profession. In so far as these problems are social, economic or political, we must realize that all citizens are equally concerned; but in so far as they relate to the administration of Justice, the Bench and Bar are largely responsible for their solution. Legislation may assist; but in these matters legislation usually waits upon the initiative of the Bench and Bar or is incited to action by their inactivity. The Judiciary is one of the three co-ordinate branches of our government; in its largest aspect, as the Chief Justice pointed out in his recent address at the Fiftieth Celebration of Boston University, it consists of the Courts, their officials and officers, including the members of the Bar.

The right of the Judiciary to prescribe within very large limits its procedure would seem to be as clear as the right of the Legislature to control its proceedings. There is certainly no prohibition of co-operation among the Judges of the different Courts and between the Judges and representatives of the Bar Associations and the Bar looking towards improvement in practice and administration. All the initiative in our government is not reposed in the legislative branch and the Bench and Bar can properly investigate their own problems and not await the probe of a legislative inquiry. In one of our counties a few years ago, a Judge of the Superior Court, of his own motion, appointed a Committee of three members of the Bar to receive, hear and report upon complaints against attorneys and this Committee functioned fairly well until the local Bar Association appointed its own Grievance Committee.

The traditional conservatism of Massachusetts is against radical innovation and needless legislation; yet we are always responsive to suggestions of progress and improvement. There is no better illustration of this policy and temper than the attitude of the Bench and Bar towards a unified Court. For many years this subject has been discussed by Bar Associations and in legal periodicals. Codes and model legislation have been submitted. These ready-made plans have never appealed to Massachusetts and neither the Legislature nor the Bar has ever given its unqualified assent to the plan; but we are slowly and cautiously adopting

and assimilating into our present system many of its main features. The recommendation of the Judicature Commission for a Judicial Council has not yet been adopted; but I fancy the real reason is that there has been a growing conviction on the part of the Bar that under the vigorous administration of the present Chief Justices of the Supreme and Superior Courts, the Judges, either alone or in conjunction with Committees of the Bar, may work out a better plan.

But in the Appellate Division of the District Courts, we have for the first time brought those Courts into a position where they can feel their essential unity and actively collaborate towards uniformity.

In the provision for calling District Judges to sit in the Superior Court, we have demonstrated that after all every Judge is part of the same judicial system and shares in the functions of the Judiciary of Massachusetts. It has elevated the importance of the District Courts; I am sure it will not lessen the importance of the Superior.

But much remains to be done and much can be done by the active co-operation of the Judges and the members of the Bar. The transfer of divorce from the Superior to the Probate Courts will demand some uniformity in practice or we shall find parties moving into counties in which the Judges are lenient, instead of, as heretofore, waiting for the appearance on the Bench of a lenient Judge. The diversity of practice in Probate Courts, in matters of routine and detail in Probate proceedings, seems unnecessarily annoying and there ought to be no occasion for seeking relief from the Legislature.

Then, there is the matter of citations and notices in equity, divorce, probate and land court proceedings. These are prolix and to the persons intended to be reached by them too often quite obscure. The simplification of these forms is entirely in the hands of the Courts and parties ought not to be subjected to the ever-increasing expense of printing long complicated notices. In Maine the publication of all citations in the Probate Court consists of three or four lines and is inserted by the Court itself. I have heard it hinted that the movement to abbreviate Probate forms in this State has been postponed to permit one or two counties to use up a few hundred dollars worth of printed forms. Another reason for simplifying and shortening these forms is to save space in our congested registrys and the expense of a clerical force in recording them.

The need of improvement in these particulars has been generally recognized for some time; Bar Associations, Committees of Judges, Commissions and Professors of Law have passed resolutions in favor of reform and expressed the liveliest interest in enlisting some one else to effect the necessary changes; but all seem to await the Legislative push and to feel that the reform to be successful must have a legislative sanction. Is it quite clear that the Judiciary, (and I again use that term in its largest sense to include the Bench and Bar), as a co-ordinate branch of the government, ought to ask the Legislature to prescribe the methods and forms of its own function?

The Legislature, as its members well know, is already overburdened with the insistent demands of individuals and groups for legislation, which they think vital to their or the public interest. The good sense of the Bench and Bar will always be found working for justice, and their concerted and deliberate conclusions as to form and practice will be as acceptable to our people as the decisions of the Council of the Bench and Bar of England have been to the English people for nearly half a century.

For a good many years it was the policy of our people to submit to the Courts questions pertaining to the administration of the government and for a long time the Courts met this responsibility to the satisfaction of the public. But, with the complexity of modern life, with new social and economic problems pressing for solution, with congested alien populations presenting new political ideals, with the decline of an independent rural population and the increase of a dependent urban population, the Courts can no longer properly and satisfactorily solve every pressing problem. Problems in economics and sociology are no longer judicial problems and the decisions of the Judges upon them are rarely accepted as final. These new conditions which have arisen quite unexpectedly during the last two decades have subjected governments and theories of governments to new and acid tests. The problems and embarrassments of the Judiciary reflect those of the Legislature and Executive. Lawyers know of the great service the members of the Legislature render each year in resisting the demands for ill-considered legislation and in rejecting fanatical and radical propositions. The Legislature every year stands between the Commonwealth and chaos. It is not surprising if in sifting out the meritorious from the useless and evil measures submitted, a little chaff gets in with the wheat. The pressure on

the Legislature, like the pressure on the Courts, increases with the complexities of the problems under consideration and if the Court sometimes looks to the Legislature to initiate a change in procedure, so the Legislature in its bewilderment over new problems sometimes adopts a plan with the expectation that its action will be reviewed and perhaps corrected by the Courts. Ninety years ago Webster admitted in argument that the legislation involved in the celebrated Charles River bridge case, was passed by a narrow majority who, doubtful of its constitutionality, were willing to vote for it so that it might come before the Courts. This Legislative disposition has always, and probably always will, exist. The reasons for it are obvious; ones constituents are not offended, but it imposes a very delicate responsibility upon the Courts.

There is another embarrassment which the Legislature and the Courts share. The American people have discovered that legislation is sometimes a royal road to immediate results, and the demand for new laws is so insistent, the subjects are so diverse and complex, so many experiments are proposed and new ideas pressed forward, that legislation is no longer clear, concise and intelligible, but is complicated and obscure. To make it effective, however, there is a disposition, to borrow a popular phrase, "to put teeth in it," with the result that many enactments are a confusion of sections and sub-sections all bristling with penalties. In addition to this, and in order to provide machinery for administration, a new Commission is created and to it is delegated a "wide rule-making power, a wide power of filling in the details of legislation, a wide power of replacing common-law standards of reasonableness by fixed rules and detailed rates and exactly limited zones, which is none the less legislative because it is more conveniently exercised by such bodies than by legislative assemblies."

The duty of interpreting such legislation and of confining Legislative Commissions within common-law bounds, is imposing a new and increasingly difficult burden on our Courts. It is the fashion, in some quarters, in view of all these troubles, to say that the Courts have broken down. The truth is that all these complexities and difficulties have put a new strain on government in general and that there are other departments of the government than the Judiciary to share in the criticism.

As Dean Pound says, we are today a commission-ridden people and

> "Not the least task of the common-law lawyers of the future will be to impose a legal yoke upon these commissions, as Coke and his fellows did upon the organs of executive justice in Tudor and Stuart England, and to reshape and develop the materials of our common law as efficient instruments of justice in the twentieth century so that reversion to oriental methods no longer seems necessary."

If, in addition to the duty of doing justice between man and man, the Courts must now correct Departmental mistakes, reconcile statutory inconsistencies, explain obscurities, temper penal provisions and assert the fundamental principle of the common law that causes and issues are to be heard and decided in open Court and not disposed of by secret investigations of inspectors, is it any wonder that justice occasionally halts? It is neither an easy nor a gracious task for the Court to review the official actions of agents of the government. The essence of efficient administration by a commission is its ability, without notice or hearing, to rule and regulate; the genius of common law demands a notice and a hearing. Should not the Bar of Massachusetts sound a word of caution and warning against an arbitrary and autocratic practice, which throws upon the Courts an unnecessary burden and compels them constantly to review the actions of other departments of the government?

If we turn from that small geographical unit, Massachusetts, and survey what is going on in the world, our local problems seem quite insignificant. We are only thinking of increasing our prosperity; but the peoples of Europe are trying to prevent a catastrophe.

Exactly five years ago, within a very few hours, the Armistice ending the great world war was declared. During more than three of these five years one of our own members has been participating in the councils of those who seek to rehabilitate Europe. He has travelled in distracted countries and seen distressed peoples and been intimately associated with representatives of the great powers who are trying to bring about a real peace.

THE BUSINESS MEETING

The fourteenth annual meeting of the Massachusetts Bar Association was held in the Mahogany Room of the Auditorium at Springfield, Massachusetts, on Saturday, November 10, 1923. The

meeting was called to order at 11:45 A. M. by the President, T. Hovey Gage, of Worcester. A detailed account of the last annual meeting having been printed in the QUARTERLY for December, 1922, the reading of the minutes was dispensed with.

REPORT OF THE EXECUTIVE COMMITTEE.

To the Members of the Massachusetts Bar Association:

DECLARATORY JUDGMENTS.

At a meeting of the committee held on January 10, 1923, with fourteen members present, the recommendations of the Judicature Commission and of the National Conference of Commissioners on Uniform State Laws for procedure for declaratory judgments, which had been presented to the Massachusetts Legislature and discussed in the MASSACHUSETTS LAW QUARTERLY for December, 1922, p. 99, were considered. After discussion

It was voted that a committee of three be appointed by the president to consider the subject and report to the committee by mail. This committee consisted of Messrs. John G. Palfrey, Edward E. Blodgett, and the Secretary of the Association. Their report to the Executive Committee together with the views of the Executive Committee thereon was printed in the QUARTERLY for February, 1923, pp. 61-64. Copies of the report and of the views of the Committee as expressed in favor of legislation to provide procedure for declaratory judgments with limitations therein explained were submitted to the Judiciary Committee of the legislature, but the subject was referred by the legislature to the next session.

CO-OPERATION OF BAR ASSOCIATIONS.

In accordance with the vote at the last annual meeting reported in the QUARTERLY for December, 1922, pp. 53-54, the subject of co-ordination and co-operation among bar associations was taken up. After discussion it was voted that a committee of three, consisting of the president, Mr. Felix Rackemann, and the Secretary, be appointed to consider the subject and report to the committee. The report of this sub-committee is submitted to the Association herewith with the recommendation therein contained that the consideration of the subject be continued in order that the members of the Association may have an opportunity to consider it further in the light of that report.

Equity Rules.

At the same meeting, the reported ruling in the Superior Court that Equity Rules XXX and XXXI, preventing a judge from exercising his discretion to make a special order for more summary procedure in contempt proceedings in which a reference to a master is necessary, than is specifically provided for in such rules, was called to the attention of the committee. After discussion it was voted that it was the sense of the Executive Committee that, if those rules, when correctly interpreted, resulted in thus limiting the authority of the court, the rules should be so changed as to allow special orders.

Quarters of the Supreme Judicial Court.

At the same meeting, the committee voted that it was the sense of the committee that more adequate quarters should be provided by the Commonwealth for the justices of the Supreme Judicial Court.

Discussion of Proposals as to the Supreme Court of the United States.

During the past year, various proposals in regard to the Supreme Court of the United States have been made in Congress. Of these, the two most widely advertised are: first, the plan brought forward by Senator Borah to provide by statute or otherwise that acts of Congress shall not be declared unconstitutional by the Supreme Court of the United States unless seven out of the nine judges concur and, second, Senator La Follette's proposal for a constitutional amendment that, if the Supreme Court holds an act unconstitutional, Congress shall have the power to pass it again and, if it is so passed, it shall be considered constitutional in spite of the decision of the court.

These proposals were discussed to some extent in the Massachusetts Law Quarterly for February, 1923, p. 66. They have been much more fully discussed recently by Hon. Charles Warren in the *Saturday Evening Post* for October 13, 1923, p. 31, and the history of earlier movements of a similar character is given in detail in Mr. Warren's three volumes, "The Supreme Court in United States History." It there appears that the same type of assault on the court in regard to legislation appeared successively in 1821, 1833, 1857, 1868, 1885, 1896, and 1905.

In his recent article in the *Saturday Evening Post*, Mr. Warren speaks of these plans as "based on the assumption of some very grave condition of injustice produced by alarmingly large numbers of decisions by the court holding acts of Congress unconstitutional," and then says:

> "Now, what are the actual facts? What is the actual extent of this alleged oft-occurring scandal, these so-called numberless decisions? Note that the proposed remedies deal only with decisions as to Acts of Congress, and not with decisions holding state statutes invalid.
>
> "The actual facts are these—and the American public will probably be amazed to learn—that during the entire course of the country's history from 1789 to 1923, a period of one hundred and thirty-four years, there have been exactly nine five-to-four cases, in which an Act of Congress has been held unconstitutional—one in 1867, involving the validity of a Test Oath Act passed in Reconstruction days, and eight between October, 1887, and June, 1923, a period of thirty-six years, making an average of one such five-to-four decision every four and a half years since 1887. The eight statutes so held invalid in this period were the Income Tax Law in 1895, the Stamp Tax Law on foreign bills of lading in 1901, the first Employers' Liability Act in 1908, the first Child Labor Law in 1918, the Workmen's Compensation in Admiralty Law in 1920, the Stock Dividend Tax in the Income Tax Law in 1920, the Federal Corrupt Practices Act in 1921, and the District of Columbia Minimum Wage Law in 1923—this last case being really a five-to-three decision, since Judge Brandeis did not sit.
>
> "It is these nine decisions which opponents of the court profess to term the oft-recurring scandal, the numberless decisions, and on which they base their demand for revolutionary changes in the functions of the court.
>
> "Moreover, in addition to these nine five-to-four decisions, there have been in our whole history only forty-one other decisions holding Acts of Congress unconstitutional, either by unanimous vote of the judges or with one to three dissenters. Yet as to these forty-one other cases, the most radical opponent of the court has never claimed that more than two or three were decided wrongly—the Dred Scott Case, in 1857; the Monongahela Navigation Company Case, in 1893, as to valuation of a public franchise; and the Adair Case, in 1908, in which the court held an Act of Congress invalid which penalized discharge of employees for belonging to labor unions.
>
> "So that the whole outcry against the court and the whole alleged serious evil boils down to this: That in one

hundred and thirty-four years there have been not more than a dozen cases in which the court's opponents think it has decided wrongly in holding an Act of Congress unconstitutional.

"Senator Borah's proposal now is that Congress shall step in and say to the court, 'If a case is before you in which John Citizen, a plaintiff, relies on an Act of Congress, and James Voter, a defendant, relies on the Constitution, and claims the statute to be invalid, then if only six judges think James Voter is right, the view of the minority of three judges must prevail, and the court must render its decision in favor of John Citizen.'

"This means not only that a minority of the court will be enabled to decide upon the rights of the parties but also that a minority of the court may render a decision which will have the effect of holding an Act of Congress constitutional.

"Minority control of the court to such an end might be quite as serious an evil as the alleged evil of five-to-four decisions. For it is a singular fact, utterly disregarded by present-day opponents of the court, that during the first seventy-five years of the court's existence the evil complained of by its then opponents was its decisions holding Acts of Congress valid; and it was because the court upheld Congress in passing statutes, deemed by numbers of our people to violate the rights of individuals and of the states, that the court was subjected, for so many years, to savage attack by considerable classes and sections of the country. Even unanimous decisions of the court and of the judges upholding the power of Congress to pass alien and sedition laws, the charter of the Bank of the United States, and the Fugitive Slave Law of 1850 were hotly denounced. What would Jefferson and the Democrats have thought, in 1819, if they had been told that a plan was proposed to allow the Supreme Court to uphold the hated Bank charter by a mere minority of the judges? What would the antislavery Republicans of 1855 have thought if the validity of the Fugitive Slave Law could have been upheld by only three out of nine judges?

"It is evident that the present proposal of Senator Borah would have been even more abhorrent to the opponents of the court in the past than were the actual decisions of the court itself.

"History, in this country, has a habit of repeating itself; and the problems of the past become, with a rapid turn of the wheel, the very serious and excited problems of today. Is there not reason to suppose that Senator Borah's plan, promulgating minority control in the court, may be equally obnoxious now or in the near future?"

Mr. Warren then suggests several hypothetical cases which, as he says, are

> "well within the bounds of possibility, and even of probability.
>
> "There can be but one answer. No class or section of the people of the United States would ever accept or have confidence in a judicial decision which fixed their rights and duties by the views of a minority of the court—of three judges out of nine."

As to Senator La Follette's proposal that a statute enacted once may be held unconstitutional by the court but, if enacted twice, it shall thereafter be held constitutional, Mr. Warren says this would mean that "A bad statute shall become good by repetition. . . . It will be seen at once that Senator La Follette's proposal demolishes all three of the fundamental provisions of the Constitution," (the separation of powers, the distribution of functions between the states and the national government, and the individual rights of citizens).

> "Under Senator La Follette's proposal, no man, woman or child in the country would have a single right of any kind which Congress would be obliged to respect or of which Congress might not deprive him or her at any time. Yet, said George Mason, the author of the Virginia Bill of Rights, chief of the possible evils of a republican form of government, is 'the danger of the majority oppressing the minority.' To make Congress absolute and final judge of the extent of its own power is to give it unrestricted power; but, wrote Jefferson, 'a legislative despotism was not the government we fought for.'
>
> "Those who imagine that Congress is not likely to infringe on any of these rights or to do any of these things forbidden by the Constitution are leaning on a very frail reed."

For what Congress has tried to do before, as he points out in a long list of instances, Congress is likely to try to do again. Mr. Warren further says:

> "But the La Follette proposal practically makes the Constitution unamendable; for whatever amendment the people may adopt, Congress will be no more bound to respect it than it will be bound to respect the present Constitution; for by a twice-passed statute it may enact something violative of the amendment itself, and yet its statute will be the

final law. Thus no amendment hereafter adopted would have any more binding effect on Congress than would the Constitution itself; and the only amendment that would be of any binding effect would be one repealing the La Follette amendment itself.

"In other words, should the La Follette amendment be adopted, it would *ipso facto* constitute the entire Constitution, and all the rest of that document would be a scrap of paper, whenever Congress chose so to regard it."

RECOMMENDATION.

We recommend that the Association go on record as opposed to any action by Congress attempting to interfere with the present functions of the Supreme Court or to establish the supremacy of Congress as the final judge of the constitutionality of legislation.

PROPOSED AMENDMENTS TO BY-LAWS.

Your committee recommends that by-law number 1 be amended by adding after the word "death" in the second paragraph thereof the word "disbarment," so that the said paragraph shall read:

"Such membership shall continue until death, disbarment, expulsion for nonpayment of dues or otherwise, or resignation in writing signed by the member and sent to the secretary or treasurer,"

and that said by-law number 1 be further amended by adding at the end of the last paragraph thereof:

"Upon receiving the names of applicants from the Committee on Membership they may be submitted by the Secretary by mail to the members of the Executive Committee and a vote taken upon them in writing. If the votes of a quorum of the committee are received, and of the votes thus received within seven days less than five are in the negative, the Secretary may declare the persons thus voted upon elected to membership and enter them upon the roll of membership."

The following new members of the Association were reported on favorably by the Committee on Membership and were admitted by the Executive Committee during the year:

LIST OF NEW MEMBERS ADMITTED IN 1923.

Thomas J. Collins, 3rd Nat'l Bank Bldg., Springfield.
Laurence Curtis, 2nd, 53 State St., Boston.
John B. Cummings, 56 N. Main St., Fall River.

James A. Donovan, Bay State Bldg., Lawrence.
William J. Drew, 18 Tremont St., Boston.
Henry P. Fielding, 218 Court House, Boston.
John L. Hannan, 25 Exchange St., Lynn.
Harold P. Johnson, 349 Main St., Woburn.
Arthur S. Jones, 60 State St., Boston.
Robert S. Kneeland, 374 Main St., Springfield.
George P. Leary, 15 Elm St., Springfield.
James W. McDonald (Hon.) District Court, Marlboro.
Harold P. Small, 31 Elm St., Springfield.
Theodore E. Stevenson, 10 State St., Boston.
Clifford P. Warren, 53 State St., Boston.
Charles J. Weston, Springfield.
Maurice Caro, 20 Pemberton Sq., Boston.
Frederick Chase, 511 Sears Bldg., Boston.
Francis C. Gray, 82 Devonshire St., Boston.
Stuart Montgomery, 84 State St., Boston.
F. Delano Putnam, 60 State St., Boston.
Albert A. Schaefer, 60 State St., Boston.
Benjamin Franklin Evarts, 600 Peoples Sav. Bk. Bldg., Holyoke.
Henry D. Wiggin, State House, Boston.
Paul D. Howard, Clinton.
Elmer H. Fletcher, 106 Main St., Brockton.
Raynor M. Gardiner, 60 State St., Boston.
Alfred Gardner, 735 Exchange Bldg., Boston.
Arthur F. Bickford, Barristers Hall, Boston.
Richard C. Storey, 53 State St., Boston.
William V. Rowe, 1523 Centre St., Newton Highlands.
Oliver Wolcott, 40 State St., Boston.
George W. Howe, Security Tr. Bldg., Lynn.
John W. Saxe, Court House, Worcester.
Harold L. Clark, 84 State St., Boston.
Robert Cutler, 84 State St., Boston.
Marcus Morton, Jr., 84 State St., Boston.
Bartlett Harwood, 84 State St., Boston.
Bennett Sanderson, 84 State St., Boston.
Henry Guild, 84 State St., Boston.
Bradley W. Palmer, 735 Exchange Bldg., Boston.
Laurence Lombard, 70 Federal St., Boston.
Frederick J. Gillen, 722 Bay State Bldg., Lawrence.

Joseph M. Hargedon, 706 Bay State Bldg., Lawrence.
John J. Fox, Jr., 603 Bay State Bldg., Lawrence.
Daniel G. Campion, 289 Main St., Springfield.
Charles F. Choate, 3rd, 30 State St., Boston.
Harold W. Connolly, 6 Masonic Bldg., New Bedford.
John C. Coughlin, 85 Devonshire St., Boston.
James E. Davis, 31 Elm St., Springfield.
Joseph F. Francis, 758 Purchase St., New Bedford.
Francis I. Gallagher, 31 Elm St., Springfield.
Shepard J. Goldin, 315 Commercial Tr. Bldg., Springfield.
Robert H. Holt, 55 Congress St., Boston.
James P. McCrohan, Five Cents Sav. Bk. Bldg., New Bedford.
Horace J. Rice, 5 Elm St., Springfield.
Irwin R. Shaw, 423 Main St., Springfield.
Miss Claribel H. Smith, 30 Avon Place, Springfield.
Abraham E. Snow, 5 Elm St., Springfield.

Respectfully submitted,

THOMAS HOVEY GAGE, *President*	FRANCIS J. CARNEY
ADDISON L. GREEN	HORACE E. ALLEN
JAMES E. MCCONNELL	FITZHENRY SMITH, JR.
CHARLES F. BAKER	EDWARD T. ESTY
FELIX RACKEMANN	MORTON COLLINGWOOD
SAMUEL C. BENNETT	HAROLD S. R. BUFFINTON
WILBUR E. ROWELL	PHILIP RUBENSTEIN
FRANK M. FORBUSH	F. W. GRINNELL
EDWARD E. BLODGETT	CHARLES B. RUGG
HENRY M. HUTCHINGS	CHARLES L. HIBBARD
JOHN G. PALFREY	CHARLES N. STODDARD

REPORT OF SUB-COMMITTEE ON CO-OPERATION OF BAR ASSOCIATIONS

To the Members of the Executive Committee of the Massachusetts Bar Association.

At the last annual meeting, it was voted that the Executive Committee be requested to confer with various local associations and present a plan for closer co-operation. The matter was brought up at a meeting of the Executive Committee in January and was referred to a sub-committee consisting of the undersigned.

At the annual meeting in connection with the motion it was suggested that,

> "there are some twenty bar associations, both city and county . . . that the associations should get together, and under the aegis of this association, or if we want to subordinate ourselves, to some other; that they should co-ordinate and co-operate."

One suggestion was that they should co-ordinate "in the form of chapters, each having its local autonomy arranged for, but under a general supervision."

The question of co-operation or co-ordination, in one form or another, is as old as the bar association movement in this country, but it has been the subject of an increasing amount of discussion and experiment in recent years as the various associations have increased in size and activity. The American Bar Association has for some years been struggling with similar problems in its relationship to state and local associations. The experience which is usually relied upon as a basis for suggestion is that of the medical associations, which will be referred to presently. Whatever may be the future development in this matter, your committee is satisfied that it must be very gradual, that at present few members of the bar, or of this Association, are conscious of the existence of any problem and, accordingly, that the first thing to be done is to provide information, which may help to bring the whole question into better perspective.

The widest aspect of the problem appears in the following story of what took place at the meeting of the American Bar Association at Minneapolis last August. Hon. John W. Davis, in his address as President, said:

> "Undoubtedly the association is destined to speak, if, indeed, it does not already do so, as the accredited voice of the united bar of the entire country. Perhaps so grave a function will compel in time some form of federal union between the national association and the associations of the several states and will convert their annual gatherings into assemblies of accredited delegates. But such a change, if it comes, as I think it must, will be but the adoption by the association of forms and methods with which no American is unfamiliar."

At the same meeting the report of a special committee was presented recommending that the representative from each State on the General Council should be *nominated* by the respective State Bar Association. In support of this plan the committee, consisting

of C. A. Severance, Elihu Root, John H. Wigmore, Wendell H. Cloud and Nelson C. Hubbard, said in their report to the American Bar Association,

> "In spite of the active campaign conducted by the membership committee for several years past, only about one-sixteenth of the bar of the country is on our rolls. It is hoped that this will speedily be increased, but it is apparent that it is highly doubtful whether for some years even a majority of the bar of the country will be listed among our members. Your committee is of opinion that the ultimate result to be obtained is a federated organization of the general nature of the one which has proved so useful in the medical profession in promoting the advancement of medical science. The Committee believes the time is not yet ripe for the adoption of such a plan, but it is impressed with the view that in addition to the relations established with local and state bar associations through the Conference of Bar Delegates, the value of which has been very great, some additional step toward co-ordination should be taken."

As the reference to the American Medical Association often appears in discussions of this character and is referred to in the passage quoted, the account of the history of that organization, as described by Mr. A. Z. Reed in his report to the Carnegie Foundation on, "Training for the Public Profession of the Law," p. 209, will help one to understand the situation:

> "In the medical profession this difficulty had been obviated by the federative form of organization adopted at the beginning. The precise steps in the building up of this organization were as follows: In 1806 the New York legislature had created a State Medical Society, composed of delegates from each county medical society then in existence or to be subsequently organized. Two years later this society voted to admit the local medical school (the New York College of Physicians and Surgeons) to membership on an equal footing with county societies. In 1839 the state society had assumed the initiative in building up a national society by this same device of integrating local units into a greater whole, and in 1847 the American Medical Association was finally organized in this basis by two hundred and fifty physicians not representing themselves, but appearing as delegates of over forty medical societies and twenty-eight medical colleges. The permanent organization, formed on the same lines, was not only pleasingly symmetrical; after certain changes, not affecting its relation to the state societies, had been made, it became also admirably efficient in

> operation. Any differences of opinion between society and society have from the beginning been settled within the profession itself, which thus speaks to the outside world with united authority."

Neither the American Bar Association nor the State Bar Associations as a rule, however, developed in this way; either because there were no local associations to be federated in the earlier period or for other reasons the usual plan of organization was an independent one. With the enormous growth of the American Bar Association, since its organization about 1878, from a few hundred members to about 20,000, of whom nearly 2,000 attended the meeting in Minneapolis in August, 1923, some representative plan of the character suggested may become a necessity because of the physical difficulties involved in any really representative expression of so large and unwieldly a body, as well as the difficulties in housing them during meetings and securing a meeting place sufficiently large for them to attend. The problem is somewhat similar to the problem faced by some of the larger towns in Massachusetts, particularly since the coming of woman suffrage—a problem which, under the lead of Brookline's successful experiment, has been met in some places by the plan of a representative town meeting, the history and character of which were discussed in detail at the annual meeting of this Association in 1918. (See MASS. LAW QUART. Feb. 1919, p. 49). In spite of these considerations the recommendation of the Special Committee was defeated at Minneapolis.

Turning now to the more local problem there is no such pressure of conditions on the State Association in Massachusetts.

The modern bar association movement in Massachusetts practically began in the early 70's with the organization of the Bar Association of the City of Boston, which followed the organization of the Association of the Bar of the City of New York. The history of that New York Association, under the leadership of Samuel J. Tilden and others, for the purpose of associating those who believed in some decent professional standards in opposition to the influence of the Tweed Ring in the profession, has been told in some detail in the MASSACHUSETTS LAW QUARTERLY (Aug., 1920, p. 360). Since the 70's, other county or city bar associations have been organized from time to time. The Massachusetts Bar Association is one of the youngest of them. It was organized in December, 1909, for the purpose, as stated in its constitution and subsequently, upon its incorporation in 1911, in its charter,

"to cultivate the science of jurisprudence, to promote reform in the law, to facilitate the administration of justice, to further uniformity of legislation throughout the Union, to uphold the honor of the profession of the law, and to encourage cordial intercourse among the members of the Massachusetts Bar."

In addition to the State Bar Association, at present the list of local associations in Massachusetts as far as known to your committee is as follows:

Barnstable County

Barnstable County Bar Association.

Berkshire County

1 Berkshire County Bar Association.
2 Northern Berkshire Bar Association.

Bristol County

1 Fall River Bar Association.
2 New Bedford Bar Association.
3 Taunton Bar Association.

Dukes County

Dukes County Bar Association.

Essex County

1 Essex Bar Association.
2 Gloucester Bar Association.
3 Haverhill Bar Association.
4 Lawrence Bar Association.
5 Lynn Bar Association.
6 Newburyport Bar Association.
7 Salem Bar Association.

Franklin County

Franklin Bar Association.

Hampden County

Bar Association of Hampden County.

Hampshire County

Hampshire County Bar Association.

Middlesex County

Bar Association of the County of Middlesex.

Nantucket County

No bar association.

Norfolk County

1 Norfolk County Bar Association.
2 Quincy Bar Association.

Plymouth County

1 Plymouth County Bar Association.
2 Bar Association of the City of Brockton.

Suffolk County

Bar Association of the City of Boston.

Worcester County

Worcester County Bar Association.

As almost all of these local associations were organized before the State Association and vary greatly in their size and in the scope and character of their activities, the question arises not only how far co-operative machinery is possible, but how far it is practically desirable and likely to produce results in any degree proportionate to the effort involved.

While the State Association has justified the movement for its organization during the thirteen years of its existence, it does not follow that a centralization of various activities through the Association is the surest, or healthiest line of progress of professional activity in Massachusetts, at least, at the present time. It is by no means clear to your committee that the independent action of the local associations and their representatives, as inspired from time to time by the varying professional interest of individuals in the different localities, and guided merely by their good sense and judgment in the matter of co-operative action, is not more promising than any plans for federated activities.

In some states, the experiment of a "unified" bar is being tried. This means that all members of the state bar are made members of the State Bar Association. The plan is described in the *American Bar Association Journal* for August, 1923, p. 467, as follows under the heading, "Bar Unification in Alabama,"

> "The Alabama General Assembly has finally passed the State Bar Unification Bill which was championed by the Bar Association of the commonwealth. The Act provides for a Board of Commissioners as the governing body of the unified bar, to be selected by ballot by the members of the State Bar by judicial districts. The Board has power to determine the qualifications and requirements for admission to the practice of law and to conduct, through a board of examiners, the examination of applicants. The educational qualifications of applicants and the subjects to be examined upon, however, shall be as now provided by law or as hereafter so provided.

"The Board has also extensive disciplinary powers. It has the right to appoint committees to take evidence and recommend action by the Board, but in all cases involving suspension, exclusion or disbarment, the testimony must be taken at the Court House of the county of the residence of the party charged. It may impose a public or private reprimand, suspension from the practice or exclusion or disbarment therefrom, but the exclusion or disbarment penalties require a three-fourths vote. The Supreme Court may, and on petition of the party aggrieved, must, in any case of suspension or disbarment from practice, review the action of the Board. It may also on its own motion, and without the certification of any record, inquire into the merits of the case and take any action agreeable to its judgment. The Board of Examiners on Admission to the Bar is to consist of three members, to be appointed by the Board of Commissioners.

"A license fee of five dollars is to be paid annually by each member of the State Bar, which, together with a fee of ten dollars payable by all applicants for admission, shall constitute a fund to be administered by the Board of Commissioners. The rules and regulations adopted by the Board relative to disbarment or admission to the bar, shall not become effective until approved by the Supreme Court. The Board and any committee appointed by it are given the power of subpoena to compel attendance of witnesses and the production of books and papers."

It appears from the same Journal for September, 1923, p. 596, that similar statutes have been enacted in North Dakota and Idaho. The Statutes of Alabama and Idaho and the arguments which led to their adoption are printed in the *Journal of the American Judicature Society* for October, 1923. These experiments will be watched with interest, but such a plan seems obviously impracticable in Massachusetts so far as the present generation of the bar is concerned and, accordingly, your committee does not extend this report by a discussion as to its desirability in Massachusetts as that also is not clear to them. They believe that bar organization, to be effective in Massachusetts, must develop gradually in accordance with the demands upon, and the resulting interest of the profession, rather than in accordance with some model experiment.

The remarks at the annual meeting in 1922 which led to the vote for a consideration of the subject indicate that the two main reasons for the suggestion of greater co-operation were the situation in regard to grievance committees of the different associations and suggestions in regard to co-ordinated action on legislative pro-

posals. The situation in regard to legislative proposals and the work of this Association in relation to them was described in detail by the secretary of the Association in a note in the MASSACHUSETTS LAW QUARTERLY for December, 1922, p. 56.

As far as legislation is concerned, the practice of the Association has been mainly that of giving greater publicity to many important legislative proposals than was formerly possible and inviting discussion for the assistance of the legislature. The MASSACHUSETTS LAW QUARTERLY makes this possible and the relatively few legislative proposals, upon which the Association has acted favorably either at the annual meeting or through the Executive Committee, have been in almost every case fully discussed in print in advance. Such of the proposals as have been adopted by the legislature have been discussed over again at public hearings before the Judiciary Committee in a number of cases for several years in succession. Without intending to minimize in any way the possibilities of the Association, it is important to remember the practical limitation of effective collective action.

As was stated by the president of the Association in discussion last year, "I don't know just how you are going to educate members of the bar (in regard to legislative matters) if they will not read matter that is sent to them." Perhaps an annual conference of the presidents and secretaries of the various bar associations might be worth trying to bring about more general discussion.

As to grievances, the situation is one in which the need of cooperative action seems greater than in any other. Perhaps for that reason, the difficulties are greater. Two of the larger and older associations, the Bar Association of the City of Boston and the Middlesex Bar Association, have active grievance committees, the members of which are so situated geographically that they can meet easily and the committees of those associations have always taken the position that complaints against lawyers in their jurisdiction should be referred to them. As labor has to be divided on a practical basis, rather than on a theoretical one, it would not only seem presumptuous for the State Association to attempt to step in and deal with such cases but, in view of the fact that the members of the Grievance Committee of the State Association live in different parts of the state, obviously they can not meet easily and frequently. This Association is not in a position financially or otherwise to deal with the complaints of these two large counties as effectively as the committees of the local associations. Good sense, therefore, seems

to indicate that the most effective co-operation under these circumstances is for the State Association to continue the practice of referring complaints to these local associations.

As to complaints outside of Boston and Middlesex County the matter was discussed at some length at the third annual meeting of the Association which was held in Springfield in 1912 and in the reports of the Grievance Committee at various times since then. As explained by Mr. Forbush, the Chairman of the Grievance Committee, at the meeting last year (MASSACHUSETTS LAW QUARTERLY, Dec., 1922), p. 39, even outside of Middlesex and Suffolk, "We have been faced by delegates from other bar associations stating that the committee had considered some complaint and passed on it, and we had nothing to do with the matter."

As Mr. Forbush further suggested, "We shall have to trust, I think, to the common sense and experience of members of the bar to come to the best solution gradually." Whether or not a committee of this Association should act probably can best be decided by the committee itself as a matter of judgment. After all, the real problem is not theoretical arrangements, either for the recognition of the independent sovereignty of local associations or the dogmatic assertion of the state-wide jurisdiction of the state Association. The common problem is the development and maintenance of reasonable standards of decent professional practice and the consequent need of the administration of some form of discipline. With the growing movement throughout the country of increased interest in such standards, perhaps the representatives of the local associations, in the counties in which the bar is relatively small, may gradually find it simpler to shift some problems on to the committee of the State Association as a more impersonal body drawn from the state at large than to attempt to deal with it locally.

As already stated, the State Association is not in a position, financially, geographically, or otherwise, to undertake the work of the whole state; on the other hand, the continued existence of the committee as an impersonal body may gradually come to be recognized as of more value in different parts of the state as time goes on.

The Bar of Massachusetts number upwards of 5,000 and the membership in the Massachusetts Bar Association hitherto, has continued at approximately from 800 to 900. Of these members, the number who attend the annual meetings is comparatively small,

the business meeting usually being attended by between 50 to 100 men, the average number probably being between 40 and 60, the numbers at the dinner or luncheon averaging about 100. Full reports, however, of the action taken and the discussion of it are placed in the hands of all the members and each member of the Association in this way has full opportunity to express his views either in writing or at the meeting. As has been explained several times, the discussions, which have taken place at the meetings in regard to various proposals bringing out individual views and suggestions, are apt to be of more practical value than the formal vote on any particular subject.

The meeting during the past few years have been completed on a single day without attempting the holiday features incident to many convention meetings which extend over two or three days. Accordingly, those who attend the meetings, while they come from all parts of the state, are men who have enough professional interest in the work of the Association to attend the meetings and take part in them. While the men who have attended the meetings, therefore, have been representative men from different parts of the state, there is no such physical pressure of numbers as to suggest the necessity of a change to a federated representative system.

Your committe suggests that the Executive Committee recommend to the Association the continuance of the matter for further consideration and the publication of this report for the information of the bar as a basis for further discussion and an invitation for suggestions.

Respectfully submitted,

T. Hovey Gage,
Felix Rackemann,
F. W. Grinnell.

It was moved and seconded that the amendments to the by-laws, recommended by the committee and printed in the notice of the meeting, be adopted. More than thirty members of the Association being present, the motion was put to vote and the amendments were adopted without a dissenting vote.

The recommendation of the Executive Committee as to the proposals relating to the Supreme Court of the United States were then taken up. After discussion as to the form of the resolution, Messrs. Frederick W. Mansfield and John G. Palfrey were re-

quested to prepare and submit a resolution in regard to the matter which they subsequently reported as follows:

> "RESOLVED that the Massachusetts Bar Association is opposed to any constitutional or statutory change in or restriction of, the power or authority of the Supreme Court of the United States with respect to the constitutionality of acts of Congress or to the manner in which its decisions shall be reached."

It was then moved and seconded that this resolution be adopted. There being between sixty and seventy members of the Association present, the resolution was adopted without a dissenting vote.

ABSTRACT OF TREASURER'S REPORT.

Balance as of October 14, 1922, Checking Account	$1,057.51		
Balance as of October, 14, 1922, Savings Department, Merchants National Bank	2,211.81		
		$3,269.32	
Interest		90.48	
Dues 1922, 8		40.00	
Dues 1923, 811		4,056.00	
Dues 1924, 14		70.00	
Expenses of the Association			$4,959.97
Balance Checking Account			279.84
Deposit Merchants National Bank Savings Department			240.99
Deposit Mechanics Savings Bank			2,045.00
		$7,525.80	$7,525.80

CHARLES B. RUGG,
Treasurer.

The account was approved subject to audit.* The list of members whose dues were not paid was referred to the Membership Committee with authority to act under the by-laws.

As in previous years the principal expenses are in connection with the MASSACHUSETTS LAW QUARTERLY and the Secretary's Stenographer.

REPORT OF THE COMMITTEE ON LEGISLATION 1922-1923.

To the Members of the Massachusetts Bar Association:

A list of statutes of the session of 1923 of special interest to the bar is given at the end of this report.

* Subsequently the Auditing Committee, Messrs. Forbush and Grinnell, reported the account correct.

Criminal Appeals.

In the report of this committee in 1922, which appears in the Quarterly for August of that year, pages 1-8, reference was made to the suggestions of the Judicature Commission in connection with appeals in criminal cases, and the committee stated that,

> "We believe the present conditions in the administration of the criminal law, described by the Commission on pages 91-97 of the report, warrant the trial of such experiments as they suggest."

A similar statement was made in the report of the committee for the previous year (See Quarterly for August, 1921).

At the annual meeting in Salem last year, the recommendations of the Judicature Commission in regard to criminal appeals was discussed and the president of the Association, Mr. Green, who was himself a member of the Judicature Commission, called attention to their suggestions as to the use of District Court judges for juries in the Superior Court to break congested dockets. The plan of thus using district court judges with juries for a limited class of cases in the Superior Court was adopted by the legislature as a temporary experiment until 1926 by c. 469 of 1923 as explained in the Quarterly for May, 1923, pp. 10-11, where the act is printed in full. The act went into operation this fall. Its constitutionality was promptly questioned in several cases, which were carried to the full bench and argued at a special session on October 9. The statutes were sustained in an interesting opinion by Chief Justice Rugg, filed October 18.

The legislature, in trying this experiment, was hardly fair, however, in requiring the district court judges to perform this continuous service with juries for somewhat extended periods without any additional compensation. The Judiciary Committee, in reporting the act, recommended a provision for $25 a day similar to the county rate of compensation for masters and auditors in the Superior Court. This provision, however, was cut out by the Senate before its passage. Now that the Supreme Judicial Court has decided the constitutionality of the act and thus answered some of the objections that were raised to it, it seems probable that the principle of elasticity thus established, which allows the judicial machinery to be adjusted to the work to be done, is likely to be continued. Therefore, it seems only fair that the provision for compensation for the district judges performing such jury service

recommended by the Judiciary Committee should be added to the law at the next legislative session.

As explained in the QUARTERLY for May, 1923, pp. 12-15, the Judiciary Committee also reported favorably an act, numbered Senate 361, reprints of which will be found on p. 89 of the QUARTERLY for May, 1923. The purpose of this bill was to provide a genuine judicial tribunal to which appeals could be made *for the revision of sentences* in the District Court, instead of the present provision by which the whole case is carried up, theoretically, to the Superior Court but, actually, merely on the sentence to the District Attorney, *who has become in practice in most appeal cases, a supreme court of appeal on law, facts, and sentences, a position which he was obviously never intended to occupy.* Appeals are allowed to the Superior Court even in cases in which there is a plea of "Guilty" in the District Court. The conditions, described in the report of the Judicature Commission and reprinted in the QUARTERLY for May, 1923, pp. 8-9, seem to justify further experiments along the lines suggested by the Commission. As has been stated, *experimenting cannot be avoided because doing nothing is, in itself, an experiment, and an unsuccessful one because it has produced the present condition of affairs.* The usual method of indefinitely increasing the number of permanent Superior Court judges has never solved problems resulting from the fact that the machinery is adapted to the business of the middle of the 19th century and not to that of today.

The bill relative to criminal appeals which was reported by the Judiciary Committee applied the proposed experiment to all the district courts in the state. The Judicature Commission, however, had recommended that the experiment be tried first in the Municipal Court of the City of Boston, in the same manner that the experiment in regard to civil appeals was tried by the act of 1922 before it was extended to the other district courts in 1922. We believe that this advice of the Commission was sound and that there is no necessity for trying the same experiment in all the courts at the same time. It can be tried out and the practice developed better in the central Boston Court, which has become thoroughly familiar with the idea in connection with its practice under the civil appeals act.

We recommend the passage of Senate 361 after it has been redrawn to apply only to the Municipal Court of the City of Boston.

Civil Appeals.

It is reported that in some counties under the civil appeals act of 1922 there are a great number of removals of small cases to the Superior Court which ought not to be so removed. When the act was under consideration in the legislature, this possibility was discussed in connection with the question whether a removal bond, similar to an appeal bond, should be required as it was, *and still is,* required in the Boston civil appeals act which was passed in 1912. As there was some objection raised to the idea of a bond, the Judiciary Committee decided to leave it out of the act as to other courts, although the Boston act provided that the court might relieve a defendant from giving a removal bond for cause, and experience of ten years had shown that only two or three applications for exemption from bond had been made to the court during that time. It was suggested by representatives of this Association to the Judiciary Committee that, if experience under the act showed it would be advisable in order to discourage removals without good reason, the requirement of a removal bond, similar to that in the Boston act with the power in the court to relieve from necessity of the bond for reasonable cause, could be added later. It may be that there is sufficient experience now under the act of 1922 to show that the bond requirement should be inserted.

We recommend that the Judiciary Committee of the legislature consider this matter.

The bill, to eliminate the removal bond requirement *in the Boston act,* which was favorably reported this year by a majority of the Judiciary Committee, was defeated under the leadership of Senator Gibbs.

In a communication printed in the Quarterly for February, 1923, p. 77 under the title, "Why Defendants Remove Civil Causes," the following suggestion is made:

> "A better method than fees or security would appear to be to require fuller disclosure of the facts upon which the jury claim rests, and since a mere certificate of the attorney that a jury issue exists has proved largely non-dependable, the affidavit of the defendant himself is no unreasonable requirement. And such affidavit should not be general, but should be required to stand upon specific facts. A defendant who demands the most expensive form of trial that the public can supply him cannot fairly object to a requirement that he shall purge himself of any suspicion that his demand

rests only on a desire to delay his adversary. Every lawyer knows how little the general denial, as now used in pleading, clarifies issues for trial, or gives notice of the nature of an intended defence. The judges of the district courts, in preparing their "small claims" rules, forbade the use of the general denial, and required a defendant to state precisely why he was not indebted as alleged. It has cleared the atmosphere wonderfully.

"Most of the cases brought in the district courts are contract cases. In these, specification of defence is easy. A defendant removing the case can and should be compelled to give it, and the court should have power to punish evasiveness by forbidding removal."

As to how far the suggestion thus made is worth trying, your committee is uncertain, but they call attention to it as one to be considered together with the requirement of a removal bond *after* information is obtained as to the number of removals in different parts of the state during the first year of the operation of the act of 1922.

Declaratory Judgments.

The committee last year renewed its recommendation to provide for procedure for declaratory judgments. The subject was discussed at the last annual meeting upon the committee's report, and was laid on the table. Subsequently the matter was referred by the Executive Committee to a sub-committee, whose report was favorable to the idea. The majority, however, recommended that it be limited at first to cases in which both parties consent to submit cases in this manner. The report, together with the favorable action of a majority of the Executive Committee, was printed in the Quarterly for February, 1923, pp. 61-64.

We again recommend legislation in accordance with the draft as thus limited and approved by a majority of the Executive Committee.

Appraisers.

We again recommend the proposal of the Judicature Commission to avoid the expense of appraisers in the Probate Courts unless the court orders them.

This recommendation was approved by the members of the Association at the last annual meeting (See Quarterly, December, 1922, p. 47).

Various other recommendations of the Commission were discussed in previous reports but, in order to avoid distracting attention from the proposals above discussed, we limit the report to them.

Respectfully submitted,

FRED T. FIELD, *Chairman.*
JEREMIAH SMITH, JR.,
ROBERT WALCOTT,
JAMES E. MCCONNELL,
RAYMOND H. BIDWELL,
THOMAS HUNT,
JAMES M. ROSENTHAL,
T. D. O'BRIEN,
FRANK F. DRESSER,
JOSEPH MICHELMAN,
F. W. GRINNELL.

ACTS OF 1923 OF INTEREST TO THE PROFESSION.

C. 5 relative to the allowance of disallowance of exceptions at a trial in case of the retirement of the removal of the presiding justice.

C. 6 extending the duration of an act to penalize the violation of certain rights of tenants.

C. 11 extending the duration of an act relative to the termination of tenancies at will.

C. 18 requiring local assessors to furnish copies of abatements to tax collectors.

C. 33 fixing the time for service of certain notices in Poor Debtor proceedings.

C. 34 relative to service of process in proceedings against female judgment debtors.

C. 36 extending the duration of an act to provide for a discretionary stay of proceedings in certain actions of summary process and temporarily abolishing fictitious costs in said actions.

C. 60 relative to the publication of notice in divorce cases.

C. 68 relative to the burden of proof in prosecutions for certain violations of the laws relative to hunting and trapping by aliens.

C. 71 relative to the sale of land subject to a conditional limitation or reversion.

C. 73 providing for the submission of certain votes and motions for referendum in the Town of Needham.

This is an interesting combination of the referendum with the town meeting plan. It provides that at any town meeting attended by 800 or more voters,

"Any vote passed or motion rejected shall, upon petition filed with the Town Clerk signed by at least 100 registered voters, be submitted to the voters for ratification or determination by official ballot at a special town meeting called for the sole purpose of submitting such vote or motion for ratification or determination by the voters at large." It does not seem to be fully described by the

term "referendum" for it contains a practical "initiative" in the provision for the reference of "rejected" proposals.

The act is to be submitted to the voters of Needham for acceptance at the next annual meeting of the town.

C. 82 extending the time for the taking of Sargent's picture entitled, "The Synagogue," from the Boston Public Library by eminent domain under c. 541 of the acts of 1922 until July 1, 1924.

The constitutionality of this act was discussed in the QUARTERLY for August, 1922, p. 81.

C. 96 conferring upon the Probate Court jurisdiction concurrent with the Supreme Judicial Court of sales of land charged with the payment of money.

C. 102 relative to transient vendors.

C. 103 relative to the marking of boundary lines of towns.

C. 111 to fix the venue of certain actions brought in district courts.

C. 112 adopting the Uniform Limited Partnership Act.

Both the Uniform Partnership Act and the Uniform Limited Partnership Act recommended by the National Conference of Commissioners on Uniform State Laws have now been adopted by Massachusetts.

C. 117 providing that the Attorney-General shall be a member of the bar.

C. 125 providing that failure in certain cases to make a claim under the Workmen's Compensation laws shall not bar proceedings thereunder.

C. 164 eliminating from the law certain unnecessary provisions authorizing the appointment of women to certain positions connected with the courts and abolishing the office of Special Commissioner.

C. 176 relative to interest and discount on inheritance taxes.

C. 183 relative to initiative or referendum petitions (dealing with certain penalties).

C. 195 relative to the incontestability of life insurance policies.

C. 222 to require instruction in the Constitution of the United States in the public schools.

C. 251 to protect witnesses under the age of 17 at trials for certain crimes, providing that in certain cases

"the presiding justice shall, if said trial is before a district court, or may, if before the Superior Court, exclude the general public from the court room admitting only such persons as may have a direct interest in the case."

C. 263 to authorize Notaries Public to summon witnesses in certain cases.

C. 266 authorizing cities and towns to purchase or take by eminent domain easements or rights in land.

C. 287 relative to income taxes on interest from certain loans and to interest on income taxes and to abatement of such taxes.

C. 294 authorizing domestic corporations, voluntary associations, and partnerships to become limited members of credit unions.

C. 305 requiring the consent of both parents to the marriage of certain minors.

C. 321 relative to the sale of real estate under licenses of the Probate Court.

C. 339 relative to the venue of certain specific crimes.

C. 340 relative to the venue of crimes in general.

These acts are primarily the result of the use of automobiles by criminals making the exact location of the commission of crime a matter of doubt.

C. 347 to penalize the removal or concealment of automobiles with intent to defraud insurers and regulating the disposition of prosecutions thereof.

C. 374 relative to the Land Court.

This act raises the fees in connection with the registration of the title to land.

C. 375 providing that the present justices of the Supreme Judicial Court may accept the increase of salary provided by the act of 1920 without waiving their right to retirement allowance as it existed prior to this act and based upon the earlier salary.

C. 377 relative to betterment assessments and tax sales.

C. 397 relative to dockets and records in defective delinquent proceedings.

C. 432 providing for investigations in certain Probate proceedings by providing for a Guardian ad litum in cases relating to care, custody, and maintenance of minor children and other domestic relations.

C. 451 providing for the removal and disqualification of certain public officers in certain instances.

C. 457 concerning the improvement of low lands and swamps.

C. 462 relative to the Boston Building Laws.

C. 469 to provide for the more prompt disposition of criminal cases in the Superior Court.

This is the act to allow the Chief Justice of the Superior Court to call in District Court judges temporarily to sit with juries in certain classes of cases. It was recommended by the Judicature Commission and discussed in the QUARTERLY for May, 1923, p . Its constitutionality was sustained by the Supreme Juidcial Court in the case of *Com.* v. *Leach* decided October 18, 1923.

C. 473 relating to deposits with others than banks.

RESOLVES.

C. 30 relative to the publication and sale of the Massachusetts Reports and the advance sheets of the opinions and decisions of the Supreme Judicial Court.

Under this resolve, the Attorney-General, the Secretary of the Commonwealth, and the Reporter of Decisions have made a new arrangement with the Fort Hill Press for the publication of the reports and for supplying printed copies of the opinions, within 48 hours after they are rendered, to subscribers at the rate of $12 a year. This plan in regard to advance sheets went into operation with the October consultation and about 127 pages of opinions have already been mailed to subscribers since October 9. This is an approach to the practice recommended by the Judicature Commission and the attention of those who are interested in receiving the opinions in print as soon as rendered is specially called to the fact that the plan is in operation.

C. 34 provides for an investigation by a special commission relative to the criminal law. This resolve was printed in the QUARTERLY for May, 1923.

C. 53 provides for a commission to investigate the subject of Jury Service. This resolve was printed in the QUARTERLY for May, 1923.

C. 55 providing for an inquiry as to the results of probation by the Probation Commission

"for the purpose of determining the ethicacy of probation as a means of securing lawful and orderly behavior of persons who have been offenders."

C. 56 providing for a commission to investigate the advisability of removing certain restrictions imposed by the Commonwealth on land in the Back Bay District in Boston.

C. 57 providing for an investigation by the Commission on Administration and Finance as to the necessity or advisability of constructing a new building for the Supreme Judicial Court, the Archives Division, and the State Library.

C. 58 providing for a special commission as to the advisability of providing a limitation of exemptions of local taxation of certain property.

C. 62 providing for a commission relative to the relocation of the State Prison.

REPORT OF GRIEVANCE COMMITTEE.

Three meetings of the Committee have been held during the year.

On February 17, 1923, a full hearing took place on a complaint, where complainants and defendant were represented by counsel. After the hearing, it was voted to dismiss the complaint.

One other complaint brought up at that meeting was placed on file, and the Secretary requested to send the attorney a letter of warning.

On February 24, 1923, complaints against John F. McKay of Brookline were heard, and respondent was present and testified. Mr. McKay was admitted to practice in the United States Court; but not in the State Courts. After hearing, it was voted to recommend disbarment. The Executive Committee of this Association later authorized the committee to recommend disbarment proceedings to the United States District Attorney; and such action was taken on May 1, 1923, at which time a full report of the facts was furnished to that office.

Four other complaints were considered at the meeting of February 24, 1923, of which three were dismissed and one returned to the complainant, without action.

At the meeting of November 3, 1923, hearings were had on two complaints. One was dismissed. The other was not acted upon, in the absence of important evidence and to await the result of a civil suit now pending.

Four other complaints were dismissed at the same meeting after the Secretary had reported the facts.

During the year the Secretary instituted disbarment proceed-

ings in the Supreme Judicial Court for Suffolk County against William J. Riley of Northampton, and Abram Goldberg of Lynn. The Attorney General was duly notified; and, under the statute, has appointed representatives to prosecute these matters.

Individual members have reported to the State Bar Examiners at the request of the Board on several occasions as to the moral fitness of applicants for admission to the bar; although this matter does not appear to properly be one of the functions of this Committee.

We understand that the State Board has now made its own rules and appointed its own local committees of attorneys to handle this matter.

The Secretary has investigated and disposed of several complaints which did not call for action by the full committee.

As Chairman, I wish once more to express my appreciation of the intelligent and generous expenditure of time and thought on the part of the Secretary and the other busy men upon the committee in the cheerful rendering of this public service.

For the Committee,

FRANK M. FORBUSH,
Chairman.

REPORT OF THE COMMITTEE ON LEGAL EDUCATION.

No occasion for the action of this Committee has been called to its attention during the year.

A report on behalf of the Committee was presented at the annual meeting of this Association in October, 1921. (See MASSACHUSETTS LAW QUARTERLY, January, 1922, Vol. VII, No. 2.) That report sets forth certain resolutions adopted by the American Bar Association respecting the qualifications of those who seek admission to the Bar. The resolutions were prepared by the American Bar Association's Section on Legal Education, and they were adopted by that Association at its annual meeting in September, 1921. (See report of the American Bar Association, Vol. XLVI, pp. 37-47 and also pp. 656-688, 1921.) On the day preceding the presentation of these resolutions to the American Bar Association the resolutions had been presented at the meeting of its Section on Legal Education and Admission to the Bar and were there debated at length. All the amendments to the resolutions as drawn were rejected. When the resolutions were presented at the meeting

of the Association on the following day the debate was renewed. At the close of the debate a motion to postpone further consideration of the resolutions until the annual meeting of the Association in 1922, was lost and the report and resolutions offered by the Section on Legal Education were adopted. The debates turned mainly around that portion of the resolutions which recites that every candidate for admission to the Bar shall give evidence of graduation from a law school complying with the following standards.

> "a. It shall require as a condition of admission at least two years of study in a college.
>
> b. It shall require its students to pursue a course of three years duration if they devote substantially all of their working time to their studies, and a longer course, equivalent in the number of working hours, if they devote only a part of their working time to their studies."

In one of the resolutions the Section's Counsel was directed to call a Conference on that subject in the name of the American Bar Association. This Conference was held in Washington on February 23 and 24, 1922. (See *American Bar Association Journal*, March, 1922, pp. 137-156. *American Law School Review*, May, 1922, vol. 4, No. 14, pp. 812-842. *American Bar Association's Report*, Vol. XLVII, 1922, pp. 482-591.) The said resolutions adopted by the American Bar Association at its annual meeting in September, 1921, were put before the Conference. At the Conference the Chairman stated that

> "the first topic for discussion is that of the justification of the proposed requirement of at least two years of college experience and training in view of the technical education necessary to make an efficient lawyer."

A vigorous and prolonged debate followed the presentation of this and other portions of the resolutions. At the close of the debate all amendments offered were defeated and the resolutions were adopted by the Conference. (See 17th Ann. Report of the Carnegie Foundation, Title, "The Progress of Legal Education" 1922.)

At the meeting of the American Bar Association in August, 1922, a brief report from the Section of Legal Education was presented. This report stated that the Conference above mentioned had been held, that it had endorsed in substance the standards adopted by the American Bar Association and that the Section on Legal Education had been directed to secure the endorsement of

those standards by the various State Bar Associations. The report further said that the matter had been called to the attention of the different State Bar Associations and had been discussed by some of them, that some had endorsed the standards while some had postponed the matter for further discussion. No action by the American Bar Association was requested in 1922 other than to receive the report and place it on file and this was done. (Vol. XLVII, pp. 38-39, 1922.)

At the annual meeting of the American Bar Association in September, 1923, the Chairman of the Section on Legal Education presented the report of that Section. In so doing he reminded the Association that the resolutions previously adopted not only set up certain standards for education and admission to the Bar but also directed that a list of the law schools which complied with those standards and a list of those which did not comply with them be prepared. The Chairman further reported that the Section had been active for a considerable time in securing the information on which such a report must be based, and expected to prepare and distribute its report within a short time. He further called attention to that resolution which provided that the Section on Legal Education should co-operate with the proper authorities in the several States to secure the adoption of the proposed standards and he cited Indiana and Illinois as two conspicuous examples of States which had co-operated with the American Bar Association, saying that in Indiana the standards had been approved on two occasions by the State Bar Association and that in Illinois the State Bar Association had adopted resolutions which substantially conformed with these standards. (See *American Bar Association Journal,* September, 1923, pp. 595-596-597. Also October number of same Journal, p. 669, and address of former Attorney General Wickersham on "The Moral Character of Candidates for the Bar", same number, pp. 617-621. See also an article by our Secretary on "The Washington Conference" in MASSACHUSETTS LAW QUARTERLY, vol. VII, pp. 194-199. A reprint of the proceedings at the Conference in the same publication, dated July 1, 1922, Vol. VII, No. 5, with an introductory statement by our Secretary and his article in Vol. VIII, No. 2, pp. 92-98, December, 1922.)

On behalf of the Committee,

SAMUEL C. BENNETT,
Chairman.

Note.—This report is submitted on behalf of your Committee in the hope that the citations given will enable all to refer readily to some of the reports of recent meetings where the requisites for a Legal Education and for Admission to the Bar have been debated.

REPORT OF COMMITTEE ON JUDICIAL APPOINTMENTS.

The Committee on Judicial Appointments has not had occasion to take action during the past Association year. No vacancies have occurred in the Supreme Judicial Court, or in the Federal Courts for the First Circuit, and but one on the Superior Court. The Committee has made no recommendation to the Governor.

Respectfully submitted for the Committee,

EDWARD F. MCCLENNEN,
Chairman.

November 8th, 1923.

It was voted that the special committee, provided for at the last annual meeting to study the question of practice under powers of attorney by men who are not members of the Bar, be continued and report at some future time to the Executive Committee.

No report was presented by the Committee on Membership in view of the fact that the results of its activities were covered in the report of the Executive Committee.

The report of the Committee on Nominations was then read as printed in the notice of the meeting and, a ballot being taken, the officers and members of the Executive Committee as therein nominated were declared duly elected as shown by the list printed herewith.

The matters before the Commission on Criminal Law and the Commission on Jury Service were then discussed and at 1.30 P. M. the meeting adjourned.

F. W. GRINNELL,
Secretary.

Note.—As the reports of the two commissions above referred to have been filed since the meeting and are reprinted in this number the discussion at the meeting is omitted.

REMOVALS OF CIVIL CASES FROM DISTRICT COURTS.

The Editor has received the following study which contains evidence of careful preparation and for that reason the facts and suggestions contained in it deserve the serious consideration of the legislature, the courts and the bar.—ED.

A year has now gone by since St. 1922 c. 532 went into effect on October 1, 1922. That statute abolished most civil appeals from district courts to the Superior Court, and substituted a right in the defendant to remove a civil case to the Superior Court before trial in the District Court. It extended throughout the Commonwealth, with slight modification, the system in force in the Municipal Court of the City of Boston since 1912.

The new practice established by St. 1922 c. 532 began under two handicaps, as compared with the practice in the Municipal Court of the City of Boston; and these handicaps must be allowed for in comparing statistics. In other courts throughout the state, the removal bond (G. L. c. 231 §104), conditioned "to satisfy any judgment for costs which may be entered against [the defendant] in the Superior Court," is not required by law. Furthermore, the absence of a speedy trial session of the Superior Court outside of Suffolk County (St. 1922 c. 532 §11) invites the removal of cases for delay; and delay clearly appears, from statistics running back to 1912, to be the motive for removal in at least two-thirds of the cases removed in Boston. Report of the Municipal Court of the City of Boston, 1916, page 7. MASSACHUSETTS LAW QUARTERLY, February, 1923, page 75.

While the avoidance of congestion in the Superior Court is important, the number or percentage of cases removed is not the sole test of the success or failure of the new practice. It is of great public importance that parties, witnesses, counsel and judges should not waste their time in inconclusive trials in district courts; that district court judges should act under the stimulus of responsibility in matter of fact and liability to reversal in matter of law; and that the district courts should have the opportunity to earn a general respect that until 1922 their feeble powers made impossible of attainment. The gains in these respects accomplished by the statute of 1922 may well be deemed

to outweigh a slight increase in the number of cases transferred to the Superior Court.

No figures are available for the work of the entire state, but from the records of the Clerk of Courts and returns from the clerks of the district courts, comparative figures for Essex County can now be given. There is no reason to believe that these figures are not fairly illustrative of conditions throughout the state. In preparing these figures, for the period prior to October 1, 1922, as well as since, all cases not removable under the present law have been eliminated—such as cases of summary process for the possession of land, petitions to vacate judgment, petitions for marriage waiver, poor debtors and equitable process, and also the peculiar proceedings under the small claims procedure. Unless such elimination had been made, the comparative figures would have been somewhat unreliable.

The figures for Essex County follow:—

District Court at	Entries for year beginning Oct. 1, 1922.	Resulting removals.	Per cent, removals to entries.	Average annual entries for 2 yrs. prior to Oct. 1, 1922.	Average annual appeals for 2 yrs. prior to Oct. 1, 1922.	Per cent, appeals to entries.
Ipswich	19	1	5.26	19½	1½	7.69
Peabody	212	14	6.60	204½	10	4.89
Gloucester	360	25	6.94	266	19	7.14
Lawrence	1139	83	7.29	918	63	6.86
Lynn	1489	110	7.39	1379	80½	5.84
Amesbury	90	9	10.00	75	3	4.00
Haverhill	546	59	10.70	390	20	5.13
Newburyport	139	18	12.95	141½	12½	8.83
Salem	524	99	16.98	516	50	9.69
For the County	4518	418	9.25	3909½	259½	6.64

The volume of business in the district courts will be seen to have increased since the statute of 1922, but the number and percentage of cases transferred to the Superior Court have also increased. What part, if any, the raising of the permissible ad damnum in district courts to three thousand dollars has played could be determined only by ascertaining the number of entries in the district courts with an ad damnum exceeding one thousand dollars and the number of resulting removals. In 14 of the 100 cases in Essex County, removed next prior to November 21, 1923, the ad damnum was in excess of one thousand dollars.

In the Municipal Court of the City of Boston, in 1910 (Report of Commission on the Inferior Courts of the County of Suffolk,

1912, House Doc. No. 1638, page 23), the percentage of appeals to entries, eliminating cases of kinds now not removable, was 8.77. In that court, for the year ending June 30, 1909 (Report of Commission on Delay in Civil Actions, 1910 House Doc. No. 1052, page 63), the percentage of appeals to all entries was 9.39. In all the district courts of the state, for the year ending June 30, 1909 (Report of Commission on Delay in Civil Actions, 1910 House Doc. No. 1050, page 62), the percentage of appeals to all entries was 7.32. Excluding Suffolk, the percentage was 5.57. Only three or four per cent of the cases entered in the Municipal Court of the City of Boston since 1912 have been removed.

While it is evident that there are some cases, in which the ad damnum exceeds one thousand dollars, which are now brought in a district court but which would not or could not have been brought in such a court until the change in the law, it is doubtless equally true that some cases, particularly of tort, which would have been brought in a district court under the appeal system, are now brought originally in the Superior Court. But the number of such cases cannot be very large. Plaintiffs in the contract cases which make up six-sevenths of the business of the district courts usually prefer speedy decisions to jury trials. The Essex County figures show an increase of 15.58 per cent in the entries in the district courts for the year ending October 1, 1923. The number of original entries in actions of contract, tort and replevin in the Superior Court in Essex County for the same year was 1486, an increase of 90 cases, or 6.56 per cent, over the average annual original entries in such cases for the two years preceding. But that total increase of 90 entries was more than accounted for by the increase in tort entries alone, which was 107.

In order to obtain some idea of the classes of cases now being removed in Essex County, the hundred cases removed next prior in November 21, 1923, were examined. Twenty-four of them were actions of tort;—seven for negligence causing personal injuries, in three of which the ad damnum exceeded one thousand dollars; twelve for negligence causing injury to property only; two for assault and battery, in both of which the ad damnum exceeded one thousand dollars; two for conversion; and one for defamation, the ad damnum in which exceeded one thousand dollars. One of the hundred was an action of replevin. Seventy-five of the hundred were actions of contract; twenty-three for goods sold and delivered, in four of which the ad damnum exceeded one

thousand dollars, but in five of which the claim was less than $100, and in two of which the claim was only $30; eighteen for money lent, money had and received, or upon negotiable instruments, in two of which the ad damnum exceeded one thousand dollars, but in four of which the claim was less than $100; nineteen for broker's commissions, building work and services, in eight of which the claim was less than $100; four for rent, in two of which the claim was less than $100; one for a tax of $65; and ten upon other contracts, in two of which the ad damnum exceeded one thousand dollars.

Altogether, in 14 cases out of the hundred the ad damnum exceeded $1000; and in 20 cases, exclusive of possible tort and contract cases in which the real amount claimed did not appear in the pleadings, the plaintiff's claim was less than $100.

In giving the right to jury trial in every civil case, however trifling, our Constitution (Declaration of Rights, Art. XV) offers litigants an expensive luxury. At least, it is expensive to the public. A jury trial necessarily costs between one hundred and two hundred dollars a day more than a trial before a single judge in the Superior Court, and still more than a trial in a district court. This additional expense of jury trial to the public often exceeds the entire amount involved in the litigation, as the Essex County figures show. The insistence upon jury trials, in such small cases especially, is an abuse of the constitutional privilege unless there is a real and serious question of fact to be tried, which a party honestly believes that a jury can try better than a judge, or better than the particular judge before whom the case would come. To claim a jury trial for any other purpose wastes the public money without any justification.

Without a change in the constitution, such abuse of the right of jury trial can be prevented only by inducing the parties to waive a jury trial, and to elect trial by a judge without a jury. Unfortunately, consideration for the public treasury interests the parties little. Nor do conscientious scruples in the making of affidavits furnish an effective barrier to unworthy jury claims. Self-interest is the efficient factor, and the waiver of jury trial can be secured ordinarily only by making it profitable. The problem of preventing abuses in removals is of importance, for if the Essex County figures are typical, removed cases make up in number about twenty-three per cent of all the civil cases at law in the Superior Court.

When we consider practical remedies for the prevention of worthless and unjustified removals, we must recognize that the plaintiff and the defendant are in very different positions, and are actuated by very different motives. One is pursuer; the other, pursued. One desires speedy, final action; the other considers that every delay is to his advantage.

But whenever any remedy is proposed, some one comes forward with the objection that there must be equality between the plaintiff and the defendant in the right to choose the forum, and that the choice of a jury trial must be allowed to the defendant as freely and unconditionally as to the plaintiff. Such an objection is apparently founded upon the conception, wholly untrue in fact, that the parties to a controversy are equally desirous of having it speedily decided by some competent tribunal.

In fact, equality in the choice of forum is always impossible, where two or more courts have jurisdiction. One party must be given the superior right. Where there is a constitutional right to jury trial, the party who desires a jury trial must have the determining choice. But it does not follow that his choice must be unconditional. Fairness to the public that pays the bills, as well as to the opponent, requires that a party who elects a jury trial, when the delay thereby secured will work to his advantage, shall furnish evidence of good faith, by complying with conditions sufficient to give assurance that it is jury trial that he really wants, and not the delay or other tactical advantage that a pretended desire for jury trial may give him.

Plaintiffs in civil cases, in communities where the district court has a full measure of public confidence, present no problem. The certainty of speedy and final trial in the district court is enough to induce them to sue in that court, unless the case has some unusual jury feature. Extra speed in the Superior Court in removed cases would still further increase the tendency to sue in the district court. When a plaintiff sues in the Superior Court, and claims a jury, his very act indicates a genuine desire for jury trial, for he gains nothing by the consequent delay.

The statement that the plaintiffs present no problem may require modification if plaintiffs in small collection cases make a practice of suing in the Superior Court, notwithstanding the delay, in order to obtain increased costs. If that practice becomes common, legislation extending the principle of G. L. c. 261 §4 may become necessary. But that practice could not be attributable to

the abolition of the minimum ad damnum in the Superior Court, for that was never more than a nominal protection against the bringing of petty suits in the Superior Court; nor could it be attributable to the removal system, for it could have been adopted equally well under the appeal system.

Defendants are the ones who present the problem in the removal system, and defendants are the parties upon whom should be imposed conditions for the removal of cases for jury trial, to protect the public as well as the opponent from the abuse of the right of removal.

The possible remedies by legislation that have been suggested may be stated briefly, without comment or advocacy.

(1) The provision for a removal bond, contained in G. L. c. 231 §104, relative to the Municipal Court of the City of Boston, might be extended to other district courts.

(2) The removal bond might be made a bond to pay the judgment generally, up to the amount of $100. *Capital Traction Co.* v. *Hof.*, 174 U. S. 1.

(3) The preliminary payment to the county of a moderate jury fee might be required, to be taxed as costs in favor of the removing party if he should prevail. Such a practice is said to prevail in twenty-five states. Report of Commission on Delay in Civil Actions, 1910 House Doc. 1050, pages 19, 60. *Williams* v. *Gottschalk*, 231 Ill. 175. *Gottschall* v. *Campbell*, 234 Pa. 347. *Randall* v. *Kehlor*, 60 Maine 37. *State* v. *Neterer*, 33 Wash. 535.

(4) District court judges might be permitted to hold jury sittings of the Superior Court in removed civil cases, just as they are in certain appealed criminal cases under St. 1923 c. 469; and those sittings might be frequent enough and long enough to prevent any considerable delay in securing trial in removed cases. See *Com.* v. *Leach*, S. J. C. Oct. 18, 1923.

(5) Discretionary costs, payable to the county or to the opponent, in an amount not exceeding $100, might be awarded against a party prosecuting or defending an action without reasonable cause; and such a provision would, of course, be applicable to unreasonable defences or delays in removed cases. Such discretionary costs would not really be penalty costs, but partial compensation for the expense unjustly caused to the county or the opponent by the unjustified prosecution or defence of the action. Such costs should not depend upon the event of a close case, but should be awarded by the court at its discretion. There are

existing precedents for discretionary costs in this Commonwealth G. L. c. 211 §10. G. L. c. 261 §13. Rules for Small Claim Procedure of the District Courts, 1922, Rule 9.

Are there any remedies open to the Superior Court without legislation?

So long as defendants can gain delay by the simple process of paying three dollars and filing a perfunctory affidavit, without further requirement, there will be many removals. Eliminate the delay, or reduce it to an equality with the delay that could be secured in the district court, and unjustified removals will be discouraged.

The experiment adopted at the September, 1923, sitting of the Superior Court at Salem cannot be considered successful. The appealed and removed cases were placed in a special list, and attacked from the rear,—that is, beginning with the oldest cases. Trying a lot of old cases imposes no psychological restraint upon the removal of new cases. The fact that a judge and jury are digging on one side of a mountain of unfinished business does not deter parties or attorneys from piling up business on the other side. Before the judge and jury can get through the mountain, the desired delay will have been obtained. Yet the psychological effect of the attack upon the removed cases is the only justification for advancing them for speedy trial; in themselves, they are entitled to no unusual consideration.

The only proposed remedy within the power of the court, without legislation, is to deal speedily with removed cases as fast as they are removed. The old appealed and removed cases should rest in the same mountain of unfinished business with the cases originally brought in the Superior Court, and be tried whenever they can be tried. But the rules might require the speedy completion of the pleadings in removed cases, and the new removals might be put at once on the short list as fast as they are removed, by inviting motions under St. 1922 c. 509, unless the plaintiff otherwise desires or the defendant shows cause to the contrary. At the first sittings selected for the experiment, the removals of the month preceding might be given precedence, and cases removed during the sitting might on motion be assigned for trial at once. At succeeding sittings, removals since the last sitting might be given precedence, and the same process might be repeated. In the summer, after the foregoing plan had become established, no great accumulation of removals would be likely,

as the statistics of the Municipal Court of the City of Boston (MASS. LAW QUARTERLY, Feb., 1923, page 75) show a marked drop in the number of removals in the early summer, when by reason of the summer vacation delay can be secured just as well in that court as by removal.

It is not probable that an undue proportion of the time of each sitting would have to be devoted to removed cases. Probably few cases would be tried under the proposed plan that would not ultimately have to be tried under present methods; and the deterrent effect of the proposed plan, firmly administered, would probably result in fewer removed cases and consequently fewer trials of removed cases. Six days, towards the end of the September, 1923, sitting of the Superior Court at Salem, devoted to new removals, resulted in 8 trials, 14 settlements and 3 defaults. Before that, at the same sitting, thirty and one-half days, devoted to a list of 241 older appealed and removed cases, resulted in 51 trials and verdicts, 5 settlements during trial, 82 other settlements, 8 nonsuits, 26 defaults, 11 references to auditors with findings final, and 58 continuances.

The objection that plaintiffs and defendants, by conspiring together to have the case removed, could advance any case for speedy trial by jury, presupposes a concert of desire and action that must be rare indeed.

If experience should show that this proposed plan is effective in reducing removals without burdening the Superior Court with too many actual trials of petty cases, there seems to be no lack of power to perpetuate the plan by rule. G. L. c. 213 §3, Eighth and Ninth, empower the court to make rules for the purposes of "expediting the decision of cases and securing the speedy trial thereof" and "remedying abuses and imperfections in practice." The unfortunately restrictive G. L. c. 231 §78, applies only to cases where the parties agree not to try. The right to have a case advanced for speedy trial under G. L. c. 231 §59, and the discretionary power to advance cases under St. 1922 c. 509, do not appear to prohibit by implication such a rule, especially as one of the proper purposes of rules is declared by G. L. c. 213 §3, Second, to be "substituting fixed and certain requirements for the discretion of the court."

In preparing a new rule, various existing rules and standing orders should be considered, as well as the statutory provisions for speedy trial sessions in Suffolk. G. L. c. 212 §16. St. 1922 c. 232 §11.

AN ANSWER TO THE SUGGESTIONS OF JUDGE CLARKE AND MR. BEVERIDGE AS TO THE SUPREME COURT OF THE UNITED STATES.

In an article in the "New Federalist Series" in the November number of the *American Bar Association Journal,* Hon. John H. Clarke made a suggestion which was widely quoted in the press of the country. About a month later, Hon. Albert J. Beveridge, the author of the biography of Chief Justice Marshall, contributed an article to the *Saturday Evening Post* in which a somewhat similar suggestion was made. The following discussion was written in answer to these suggestions and appeared in the *Boston Transcript* of December 20 and the *Springfield Republican* of December 22, 1923. It is here reprinted for the consideration of the Bar.

Mr. Beveridge on the Court.

Several years ago Hon. Albert J. Beveridge captured the interest of the legal profession and many laymen by his "Life of Chief Justice Marshall." Consequently anything which he says about the Supreme Court of the United States attracts attention. In the Saturday Evening Post of December 15th he contributes an article under the title "Common Sense and Constitution," in which he discusses the attacks on the court. His article will help people to understand the problem; but one of his suggestions must be challenged in fairness to the court. He says very truly that Congress cannot tell the court how to decide cases and so cannot modify the practice of five-to-four decisions. But he says if the Supreme Court would publicly announce a rule that six of our nine judges shall agree before holding an act of Congress unconstitutional the movement to take away the court's power would stop, and that such a rule of "policy" would show "statesmanship of the highest order." Would it?

Mr. Beveridge joins hands with Hon. John H. Clarke, who recently resigned from the court. Judge Clarke thinks that some such rule would "add greatly to the confidence in the court." Judge Clarke suggests that the rule should be that the dissent "of two or more" judges should necessarily raise a rational doubt," which should prevent the court from declaring an act invalid. This difference will help the rest of us in testing the soundness of the suggested rule. In support of his proposal Mr. Beveridge refers to the fact that, early in the history of the court, when travelling,

by coach or on horseback, with bad roads, was difficult, and illness, or other reasons, sometimes prevented a full attendance of judges so that the court had to sit with merely a quorum, Chief Justice Marshall and his associates announced the rule that "except in cases of absolute necessity" the court would not decide constitutional questions except "by a majority of the whole court." That rule was adopted to meet the criticism that such cases might be decided by a majority of a quorum which was actually a minority of the whole court. That rule has been followed ever since. It is now proposed that it should be extended to require a majority of six, or seven or eight. But such a change would bring about the exact situation which Marshall's rule prevented—decisions by a minority of the court.

Mr. Beveridge points to the two-thirds requirement of the Senate for the impeachment of officials, to the unanimous requirement of a jury's verdict, to the two-thirds requirement of Congress in passing a bill over the President's veto, and to the two-thirds rule in Democratic national convention, and says, "So we see that the majority principle does not permeate our institutions after all." But he overlooks the fact that the most serious matter involved is not "the majority principle" but the individual, intellectual and moral responsibility of every judge in the performance of the judicial function, which is the highest security of judicial character that we have or can have, and has developed and maintained that court in its pre-eminent position. If this sense of individual responsibility is weakened, the deserved respect, not only of the bar, but of the people, for that tribunal will be weakened. As soon as we leave the firm ground of this individual responsibility to get into the position of counting noses on the bench and Mr. Beveridge thinks we should count six noses, while Judge Clarke thinks we should count seven or eight.

Mr. Beveridge points out clearly that the judges' functions, because of their necessary training and study, are actually quite different from those of members of Congress. Whatever anyone thinks of the theory, everyone who knows anything about legislatures today knows that many legislators do, and as human nature does not change much, always have and always will, and, indeed, want to be able to, "pass the buck" to the court on many questions, partly for political reasons and partly because they may not understand them fully. With ninety-six members of the Senate and almost five hundred members of the House this obviously must be so. Men who have served on juries, if they stop to think about it fairly, also know that the decision of important questions of law, by a court of appeal of highly trained men, must be a very different sort of problem from the verdict of a jury on the questions of fact that come before them.

Mr. Justice Story said long ago, "Upon constitutional questions, the public have a right to know the opinion of every judge who

dissents from the opinion of the court and the reasons of his dissent." If this is so as to dissent, it is obviously more true as to the convictions of the majority of the court. Would public confidence in the court be increased if the American people knew that five, six or seven judges were clearly convinced, for published reasons, that the Constitution meant one thing, but, because of a rule "of policy," and because of the convictions or doubts expressed by one, two, three or four minority judges, the court decided that the Constitution meant something else? How would the "common sense" of the American people respond to such a state of affairs? Would they not consider that the majority of the judges had abdicated their great judicial function? Every judge is now disciplined for that great function by the responsibility for thinking harder about his reasons in the face of the possibility of published dissent by other judges, or changing his opinion, not because of numbers, but because of the reasoning of his colleagues. That is the American principle of an independent judiciary. Shall we give it up?

The traditional rule of the court on constitutional questions means that each judge should be convinced beyond a reasonable doubt in his own mind, not in the mind of some other judge, before he joins in declaring an act of Congress unconstitutional. John Marshall and the other great judges of the past would be surprised if they were told that the rule which they formulated and applied meant that they ought to surrender their reasoned convictions and decide cases in accordance with the views, or doubts, of a minority, and that such a course would increase confidence in the court.

F. W. GRINNELL.

THE MASSACHUSETTS REPORTS.

Reprinted from the "Bar Bulletin" of the Boston Bar Association.

The Attorney-General, Secretary of the Commonwealth, and Reporter of Decisions have arranged with The Fort Hill Press for advance sheets of opinions within 48 hours of the time when they are filed. These take the place of the "parts" heretofore published. Sheets are paged consecutively for the purpose of citation, and a brief index will be issued from time to time. The cost is $12 per year. This is a great advance and those who want the opinions promptly and regularly are urged to subscribe promptly so that the new plan may be established and continued. The Judicature Commission recommended that opinions be printed before they are handed down. While that step has not been taken, the plan adopted is so close to it that it deserves the support of the Bar.

THE PROPOSED BILL RELATING TO COMMERCIAL ARBITRATION AGREEMENTS.

During the past few years, an active movement has been going on to increase the use by business men of commercial arbitration as a method of settling business disputes without the delay and expense of law suits. An article by Hollis R. Bailey, Esq., showing the interest in this matter in different parts of the world was printed in the QUARTERLY for February, 1923, (p. 55) with a note by Dean Pound. Cf. Julius Henry Cohen's "Commercial Arbitration and the Law". The movement has been particularly active in New York and New Jersey where arbitration societies have been formed. An act was passed in New York in 1920 making arbitration agreements in contracts binding upon the parties whether they were drawn in the form of conditions precedent to liability or not. This act was sustained by the New York Court of Appeals in *Berkowitz* v. *Arbib et al.*, 230 N. Y. 261. A somewhat similar act was passed in New Jersey last year. There appears to be an increasing use made of these acts by business men in New York and New Jersey. The movement among business men has now reached Massachusetts.

The bar generally in Massachusetts has been, and is still, pretty sceptical about the value of arbitration agreements, although we have had, for more than a century, a statute, under which agreements for the arbitration of existing disputes might be made, which now appears as G. L. c. 251. Under existing law in Massachusetts, there are various kinds of arbitration. *First*, after suit is begun, by rule of court. This method is not described in the statute, but it is described in "Colby's Practice." (See also "Tidd's Practice.") It is referred to briefly in s. 10 of c. 251. In such a case, the court refers the matter to an arbitrator or arbitrators as it does to a master or an auditor. (See *Price* v. *Goodenow*, 232 Mass. 267.) A second method for the determination of existing disputes is that provided in c. 251 where the parties, before any suit is brought, appear before a justice of the peace and sign an agreement specifying the arbitrator and the things which he is to arbitrate. A third method relates to agreements to arbitrate *future disputes*. Such agreements, unless drawn in a particular manner, have been held, in Massachusetts and elsewhere, in the absence of statute, to be unenforceable because they ousted the jurisdiction of the courts. This is the general common law rule.

On the other hand, if the contract was skilfully drawn in such a way as to make arbitration a condition precedent to liability under the contract, it was enforceable like any other condition precedent. This development of the law resulted from the skilfull draftmanship of Mr. Justice Cresswell before he was appointed to the English bench. An arbitration provision drawn by him as a condition precedent went through the courts and was finally sustained by the House of Lords. An interesting account of the development of the common law may be found in *III Am. Law Review* for Jan., 1869, p. 249. Further information will be found in an opinion by Judge Hough of the second circuit in *U. S. Asphalt Co.* v. *Trinity Lake Co.*, 222 Fed. 1006. The leading English case on the subject is that already referred to in the House of Lords, *Scott* v. *Avery*, 5 H. C. 811. The English Arbitration Act of 1889 (52 and 53 Viet. C. 49) will be found in Slater's "Law of Arbitration and Awards", p. 155.

A number of meetings of representative business men from different parts of the state have taken place during the past few months and various lawyers have been asked to assist in drafting an amendment to the Massachusetts statute which would enable business men who wished to provide in their contracts for this method of settling future disputes to do so in such a way as to be binding upon the parties, even if the so-called "technical" provision, making the arbitration a condition precedent, were not inserted. As a result of these various conferences, a bill was recently filed, the substance of which is stated below. It should be distinctly understood that the bill does not provide that anybody be compelled to make such an agreement but simply that, if the parties to a contract see fit to make such an agreement, it shall be as binding as any other contract and proceedings under it may be taken without delay. In view of the fact that Massachusetts has had an arbitration act on the statute book for many years, the proposed bill, instead of submitting an entirely new statute covering the whole subject, as was done in New York and New Jersey, simply provides for a few amendments of detail in the present c. 251 and then adds at the end certain new sections, 14 to 22, to cover the matter of agreements for the arbitration of *future disputes*. No provision in regard to jury trial is inserted because it is clear under *Boyden* v. *Lamb*, 152 Mass. at p. 420, that a party who denies the existence of the arbitration agreement is entitled to a jury on that issue if he wishes it.

The committees of the Massachusetts Bar Association have

taken no action on the proposed bill. The petitioners have furnished the editor with a copy of the bill as filed, in order that it might be promptly submitted in the QUARTERLY, both to the committees and members of the association, for consideration and comment before the legislative hearing.

Special attention is directed to the proposed new section 16, the purpose of which is to leave the parties to their common law rights in the cases specified. As to the common law, see *Brocklehurst & Potter Co.* v. *Marsch*, 226 Mass. 3 and *Marsch* v. *Southern New England R. R.*, 230 Mass. 483.

As to the proposed section 20, some lawyers will probably feel that questions of law should be reported at the request of any party. That is not provided for under the present statute and the idea of the draftsmen was to avoid delay. Questions of law "apparent on the record" would be open under section 12 of the present act which is incorporated by reference in the proposed § 22.

F. W. G.

AN ACT PROVIDING THAT PARTIES TO A CONTRACT MAY AGREE IN WRITING THAT ANY CONTROVERSY THEREAFTER ARISING UNDER THE CONTRACT SHALL BE ARBITRATED.

S. 1 amends G. L. c. 251, s. 2 by providing in substance that it shall be unnecessary to go before a justice of the peace to execute an arbitration agreement as to existing disputes under the present law and that the signing of the agreement shall be sufficient.

S. 2 amends s. 7 by adding the following new sentence:

> "In the case of the death of an arbitrator or of his inability or refusal to serve, the Superior Court shall, upon the application of either party, name an arbitrator or arbitrators in his stead."

S. 3 amends s. 11 by adding:

> "All expenses of arbitration under this act shall be borne by the parties."

S. 4 amends s. 13 by striking out the words:

> "The fees of the justice or special commissioner for the agreement of submission and acknowledgment shall be forty cents and the" so as to read as follows:
>
> "Fees in Court shall be the same as for like services relative to an award made under a rule of Court."

S. 5 proposes to add at the end of c. 251 the following new sections:

> S. 14 "The parties to a contract may agree in writing that any controversy thereafter arising under the contract which might be the subject of a personal action at law or of

a suit in equity shall be submitted to the decision of one or more arbitrators.

S. 15 "Such an agreement may either name the arbitrator or arbitrators or may define the method by which an arbitrator or arbitrators is to be chosen. In case of the death, inability, or refusal to serve of any person so named, or in case the method of choosing arbitrators prescribed by the parties becomes impossible of performance because of the default of one of the parties or otherwise, or in case such agreement fails either to name or to provide a method for choosing an arbitrator or arbitrators, the Superior Court shall, upon the application of either party, name an arbitrator or arbitrators.

S. 16 "If a party to the contract be named as arbitrator, or the agent or agents or employee or employees of any one party to the contract be named in the contract or selected by the method therein defined as sole arbitrator or as a majority of the arbitrators under such agreement, the provisions of this act shall not apply.

S. 17 "The submission shall be made within six months, unless otherwise stipulated by the parties but in no event within less than a reasonable time, after due notice by any party to the contract claiming the arbitration of any controversy thereunder.

S. 18 "If any of the parties neglects to appear before the arbitrators after due notice is given to him of the time and place appointed for hearing, the arbitrator or arbitrators shall proceed in his absence.

S. 19 "The award of the arbitrator, or of a majority of the arbitrators, being made and reported to the Superior Court within one year from the date of the submission or within such further time as the Court may upon the application of the arbitrator or arbitrators allow, the judgment thereon shall be final.

S. 20 "Any question of law may, and upon the request of all parties shall, be referred by the arbitrator or arbitrators to the Court to which the report is to be made.

S. 21 "Such an agreement shall constitute a defense to any action at law or in equity upon any controversy thereafter arising under the contract between the parties upon proof that the party pleading the agreement as a defense was willing and ready to submit to arbitration in accordance with the terms of the agreement.

S. 22 "General Laws, Chapter 251, sections 6-13 shall apply to and govern all proceedings under such an agreement so far as consistent with the preceding sections."

A final section provides:

"This act shall not apply to contracts made prior to the taking effect hereof."

A LAW LIBRARY'S REQUEST

Dec. 24, 1923.

Editor Massachusetts Law Quarterly:

The Harvard Law School Library would like very much to get records and papers dealing with railway receiverships and reorganizations. The Library of the Graduate School of Business Administration is desirous of procuring documents relating to corporations, their finance, history, organization, and management.

I have no doubt that there are a great many documents of the kind wanted by us and by the School of Business Administration in lawyer's offices. We will be very grateful to you for any assistance which you may be able to give us in bringing this matter to the attention of the members of the Bar and readers of the MASSACHUSETTS LAW QUARTERLY.

If it should be thought advisable, documents of the kind mentioned above could be sent either to us or to the School of Business Administration on deposit, to be withdrawn whenever the depositor may desire. Of course, however, we would much prefer to have documents sent to us as gifts, but this might not be as satisfactory to some, who may have the sort of thing we want, as a deposit arrangement.

Anything which you may be able to do for us in this connection will be greatly appreciated.

Very sincerely yours,

ELDON R. JAMES,
Librarian.

HOUSE . . . . No. 59

The Commonwealth of Massachusetts.

SPECIAL REPORT OF THE COMMISSION ON ADMINISTRATION AND FINANCE (UNDER CHAPTER 57 OF THE RESOLVES OF 1923) RELATIVE TO CONSTRUCTING A NEW BUILDING FOR THE SUPREME JUDICIAL COURT, THE ARCHIVES DIVISION OF THE DEPARTMENT OF THE STATE SECRETARY AND THE STATE LIBRARY.

STATE HOUSE, BOSTON, November 22, 1923.

To the Honorable Senate and House of Representatives in General Court assembled.

GENTLEMEN: — On May 16, 1923, the Legislature passed the following Resolve: —

Resolved, That the commission on administration and finance is hereby authorized to investigate and report as to the necessity or advisability of constructing a new building for the supreme judicial court, the archives division of the state secretary's department and the state library. The commission shall file its report with the clerk of the house of representatives on or before the fifteenth day of October of the current year, and at the same time shall file a copy of the same with the budget commissioner as a part of the budget estimates required to be submitted under section four of chapter twenty-nine of the General Laws.

Since the Legislature passed this resolve arrangements have been made which remove the State Library from the subject under discussion. The Governor and Council have allocated to the State Library Trustees

the large basement room in the west wing of the State House. The dimensions of this room are 160 x 50 x 23 feet, and if it were filled with books in standard stacks it would hold 360,000, or more than 75% of all the books in the State Library. State Librarian Redstone plans to move the newspaper files from the mezzanine floor of the library room to this new annex. This will free sufficient space to move the law stacks from the present reading room floor to the mezzanine floor, and will largely increase the present reading room seating capacity. The seating capacity has been increased during this summer from 70 to 100, by the substitution of standard library tables and chairs, and when the law stacks are moved this number can, if necessary, be increased to 150, which should be ample for an indefinite period. It might be well to call attention to the fact that the principal use of the State Library reading room is by law students from several law schools located on Beacon Hill. So long as there is ample room to accommodate these students there is no reason to limit such attendance. If the number should increase beyond the reasonable capacity of the room, it would seem proper to restrict law student use to certain days or certain hours of the day. With the increased capacity of the reading room we do not believe that such action will be necessary for many years.

An expenditure of $15,000 will equip this new library annex with steel newspaper and book stacks. Then it will be possible to move to this annex the newspapers and 160,000 books which are seldom used. Additional volumes are accumulating in the State Library at the rate of 6,000 a year. This expenditure will take care of the expansion of the State Library for twenty-five years. Stacks for about 100,000 additional volumes can be placed in the annex when necessary.

We do not find that the Secretary of State's archives are seriously crowded. There is a gradual natural

increase, but State Librarian Redstone advises us that he can permit the Secretary of State to use a portion of this new library annex for such archives as cannot be accommodated in the present space. We believe that this will take care of additional archives for many years.

Since no additional room in a new building is required for the State Library or the State archives, the question arises whether a new building is advisable for the Supreme Court alone.

We have approached this subject with the firm belief that in this period of high taxes and high building costs no new building for the Supreme Court should be constructed, provided the present quarters are adequate and comfortable or can be made so.

The Supreme Court moved from the site of the City Hall annex into the Suffolk County Court House in 1890. In 1907 and the five years following $931,930.11 was expended to provide additional court room accommodations in the Court House. Of this amount the State will finally pay one-third, or approximately $310,000.

With the assistance of an architect we have investigated the rooms occupied by the Supreme Court to determine whether, by some re-arrangements, more space could be made available. The two court rooms are of sufficient size. Adjoining the court rooms the justices have a lobby and a consultation room (32 ft. x 24 ft.), both of which seem suitable for the requirements. Near the consultation room the Chief Justice has a private office. Those who object to present conditions claim that each justice should have a private office, and we concur with this view. There appear to be rooms available for this purpose. Justices DeCourcy and Crosby share two offices immediately above the lobby on the mezzanine floor, a private stairway connecting. This leaves four justices who are not provided with private offices.

On the same floor and adjoining the full bench court

room are two rooms known as the mahogany rooms, one 20 feet square and the other 16 feet square. At present each room is used by a stenographer. We would suggest that these rooms be used as private offices for two of the justices.

Adjoining the Equity Court room are three rooms which contain the law library formerly belonging to the late John L. Thorndike. We suggest that this library be removed to the Social Law Library to be maintained there for the exclusive use of the Supreme Court justices. A portion of the library and the two law clerks could be located in Rooms 415 and 416, adjoining the Social Law Library. There is ample space in the stack room for the balance of the Thorndike library. There is an electric book elevator from the justices' rooms to the Social Law Library which permits the convenient use of the library by the justices. If the Thorndike library were so removed two of the rooms which it now occupies, one 17½ ft. x 21 ft., the other 14 x 17½ ft., would be available for private offices for the two remaining justices. If it were considered desirable, a seven-foot wooden screen could be built at the side of the Equity Court room, giving the justices a private passageway between these two rooms and the consultation room and lobby. We suggest that the third room now occupied by the library be used as a consultation room.

On the mezzanine floor, connected by a private stairway, are the two offices now used by Justices DeCourcy and Crosby. Also on this floor are two small rooms for stenographers. We suggest changes in partitions which would enlarge these two rooms to 14 ft. x 18½ ft. and 17 ft. x 18 ft. These rooms would be ample for four stenographers.

We would suggest that a modern system of private telephones be installed, connecting all offices, the justices, stenographers, law clerks, reporters, etc.

We have further planned for the private use of the Supreme Court justices an electric, automatic passen-

ger elevator from the street floor to the main court room floor and the mezzanine floor.

The estimated cost of these improvements is $15,000.

With these proposed changes each justice would have a private office, and there would be three other rooms available for consultation. With court rooms of ample size, with each justice provided with a private office, with two rooms for stenographers and three consultation rooms, we believe that there would be no justification at the present time for the construction by the State of a Supreme Court building.

HOMER LORING.
R. L. WHIPPLE.
THOMAS W. WHITE.
JAMES C. McCORMICK.

The Commonwealth of Massachusetts.

In the Year One Thousand Nine Hundred and Twenty-Four.

RESOLVE

Providing for Improvements in the Quarters occupied by the Supreme Judicial Court in the Suffolk County Court House.

Resolved, That an unpaid special commission be established, to consist of the sheriff of Suffolk county and two other persons appointed by the governor, to make certain improvements, subject to appropriation to be made hereafter, in the quarters occupied by the supreme judicial court in the Suffolk county court house.

HOUSE . . . . No. 224

The Commonwealth of Massachusetts.

REPORT OF THE SPECIAL COMMISSION TO INVESTIGATE THE CRIMINAL LAW (UNDER CHAPTER 34 OF THE RESOLVES OF 1923).

To the Honorable the Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled.

The Commission appointed under Chapter 34 of the Resolves of 1923, entitled "Resolve Providing for the Investigation by a Special Commission Relative to the Criminal Law", submits herewith its report in accordance with the requirement of the Resolve.

CHAPTER 34.

RESOLVE PROVIDING FOR AN INVESTIGATION BY A SPECIAL COMMISSION RELATIVE TO THE CRIMINAL LAW.

Resolved, That a special commission, to consist of a justice of the superior court, a justice of a district court, a district attorney, a probation officer of the superior court, all to be designated by the governor, the commissioner of correction, and one other person to be appointed by the governor with the advice and consent of the council, shall investigate and consider the advisability and feasibility of revising and clarifying the provisions of general law relative to the imposition of penalties for the commission of crime, with special regard to the definition of "felony" and "misdemeanor" and the relation existing between commitments to the various state and county penal institutions and the prescribed penalty; provisions relative to the imposition of successive and concurrent sentences and to the parole of persons subject to such sentences; and provisions governing the sentence or other disposition of persons on parole from penal institutions. The commission shall also investigate and consider such other matters related to the foregoing subjects as it may deem fit and proper. It shall report the results of its investigations, with drafts of any proposed legislation, to the general court not later than December fifteenth, nineteen hundred and twenty-three. The members of the aforesaid commission shall receive no compensation for their work under authority of this resolve but shall be allowed for traveling and other expenses such sums as may be approved by the governor and council. [*Approved April 30, 1923.*

The Commissioners were appointed on July 11, 1923, organized on July 20, 1923, and appointed Fernald Hutchins, Esq., Clerk of the Commission.

In order to give notice to all persons interested so far as possible, so that the Commissioners could have the benefit of suggestions and criticisms of those who had given the subjects covered by the Resolve study and consideration, some six hundred letters calling attention to the Resolve were sent to the Justices of all the courts in the Commonwealth, Clerks of Courts, District Attorneys, Probation Officers, Bar Associations and those members of the Bar in each county who were known to be particularly interested in the criminal law. A public hearing was also given at the State House, notice of which was extensively advertised in the press of different parts of the Commonwealth.

The title of the Resolve is general and apparently gave the impression that the Commission had broad and general powers of investigation of the criminal law, authority to revise its substantive provisions, many of them settled by the decisions of our Supreme Judicial Court since early days, and to formulate general changes in the fundamental scheme on which the existing criminal law is established, as well as the practice and procedure in the Commonwealth.

The Commission has been requested, for instance, to provide changes in form of certain indictments; to abolish entirely the fixed time with reference to sentences, and to leave the whole question of the length of sentence to be imposed to the discretion of the individual judge imposing such sentence; to make provisions with reference to the conduct of district attorneys in the presentation and trial of cases before juries; to abolish capital punishment; and, on the other hand, to make more stringent the provisions with reference to the parole of persons convicted of crime and to require more severe penalties for certain crimes.

From all the matters submitted to the Commission, the most important requiring attention appear to be the elimination of delays in the prosecution of crimes, the necessity after arrest of speeding up the final imposition of the penalty for the crime committed, including the presentation of questions of law on bills of exceptions, and what appears to be an unnecessary expense in the present methods of prosecutions, all of which apparently have not kept pace with the increased speed and intensity of the general activities of the social and business world.

Very able and learned arguments were presented to the Commission advocating a change from the present universal use of the indictment in presenting for trial the crimes that are now so prosecuted, and the substitution therefor of the method commonly used in England and in many of the states of presenting cases on information by the prosecuting officer.

The adoption of such a change would reduce greatly the necessity for prolonged sittings of the Grand Jury, and also reduce the number of cases that are now required to be presented to that body. Statistics were presented to the Commission in this connection.[1] For example, — cases that have been presented to the Grand Jury throughout the Commonwealth have increased in the decade between 1912 and 1922, from 2,334 cases to 5,344 cases. Of those presented in 1912, about 18% of "no bills" were returned, while of those presented in 1922, about 10% of "no bills" were returned. In 1912 there were 1,614 indicted and 938 of the defendants indicted in that or previous years claimed a trial. In 1922, 4,676 were indicted, and 619 of the defendants indicted in that or previous years claimed a trial. In 1912, 198 were sent to the State Prison, whereas in 1922 only 188 were sentenced to that institution.

The contention is made that under a more efficient system discovery would be made in earlier stages of the prosecution of cases that would be likely to end by sentence other than to the State Prison, with a vast saving of time, expense and inconvenience.

To speed up prosecutions and secure more rapid imposition of penalties following commission of crimes, there were also presented to the Commission various methods of enlarging the jurisdiction and powers of the district and municipal courts throughout the Commonwealth; the benefit that would accrue by allowing the person who so desired to plead guilty when first apprehended; and also the desirability of giving the right to the defendant to waive trial by jury, thus securing an earlier disposition of his case than is now possible.

It seems to the Commission, from the information and arguments submitted to it, that much could be done to change the ancient routine now followed in the initiation of criminal prosecutions and subsequent conduct of the cases and the final disposition, both with fairness to the person charged with crime and with increased speed and greater facility to the prosecuting officials, all with a saving of a tremendous expense that, with the system now in vogue, is necessarily wasted.

While the foregoing suggestions seem to be of sufficient importance, as presented to the Commission, to be called to the attention of the Legislature, it appears from the terms of the Resolve that specific action or recommendation covering these subjects is not within the scope of our authority. If it were, such fundamental changes could not be safely formulated within the limited time at the disposal of this Commission. The authority granted by the Resolve is restricted specifically to the subjects mentioned therein. The Commission, therefore, reports specifically its conclusions only as to these subjects.

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[1] From Reports of Commissioner of Correction.

The first of these subjects is the advisability and feasibility of revising and clarifying the provisions of general law relative to the imposition of penalties for the commission of crime *with special regard to the definition of "felony" and "misdemeanor,"* and the relation existing between commitments to the various state and county penal institutions and the prescribed penalty.

This Resolve was the outcome of certain requests to the Legislature at its last session by the Commissioner of Correction for changes in the law relative to the subjects designated in the Resolve. It was his desire to eliminate difficulties that had arisen by reason of inconsistencies and contradictory provisions in the present laws. It appeared that some of these difficulties might be obviated by a change in the present statutory definition of "felony."

It requires but a brief consideration of the penal statutes in Massachusetts to realize that the definition of felony has very nearly lost its former significance. In the early days of English criminal jurisprudence part of the punishment for certain crimes consisted in the forfeiture to the Crown of a man's property or privileges. Such crimes were said to work "infamy" on the man guilty thereof. Certain crimes thereafter came to be known as "infamous crimes" or crimes calling for infamous punishment, and were later known as felonies. Around this distinction between felonies and non-felonies certain rules of law and procedure have developed. The laws relating to jury challenges in criminal cases, the right to arrest without a warrant, the right to take the finger-prints of inmates of penal institutions, the impeachment of the testimony of witnesses, and other sections of our statutes still preserve the distinction between felonies and other crimes.

In the early history of crime in this Commonwealth, with the abolition of forfeiture and attainder, and in fact all that was largely known in the early days as "infamous punishment", it became necessary for the courts to redefine the term "infamous", in order that these distinctions between felonious and non-felonious crimes should be maintained. In the first half of the nineteenth century it was common practice in Massachusetts to send offenders of the misdemeanant type to houses of correction and more serious offenders, who were more apt to be felons in the sense that they had committed the kind of crime which previously had been punished by infamous punishment, to the one state institution, namely, the State Prison. It was natural, therefore, that legislation should have been enacted from time to time which distinguished between crimes punishable in the State Prison and those punishable elsewhere. Therefore, when in 1852, in the case of Jones vs. Robbins, 8 Gray 329, the Supreme Judicial Court was called upon to define "felony" and "infamous punishment", it was not surprising that the court held that imprisonment in the State Prison was infamous punishment and imprisonment elsewhere was not. The decision in this case had this curious result, however, that the classification of the crime, — that is, as to whether it was felonious or not, — depended upon the place to which the criminal might be sent and not on the nature of the crime itself. The distinction no doubt was a workable one at the time it was made and as a matter of fact it is probably similar to the distinction adopted in many of the other states in the Union.

With the development of penology, however, and the establishment of reformatories, training schools, prison camps and other similar institutions, the distinction became technical rather than real. A large number of penal statutes today, in fact by far the greater number, give the option to the judge to send the defendant either to the State Prison or to a jail or house of correction; but, nevertheless, the fact that a defendant *might* be sent to the State Prison constitutes him a felon, even though in fact he may receive, for instance, a 60-day sentence to a jail or house of correction.

The Commission has considered three ways of overcoming some of the objections to the present definition of felony.

(1) To classify and list the more serious crimes as felonies with a provision that such other crimes as the Legislature may from time to time declare or define to be felonies shall thereafter be felonies and that all other crimes shall be misdemeanors. It is to be presumed that any such list would include the more serious crimes such as murder, manslaughter, rape, and arson. In such cases, and in others, the range

in degree of culpability is very great and if certain crimes are to be declared to be felonies sufficient latitude in disposition or sentence should be given the judges.

(2) To attempt a new definition of felony which would be based upon the character of the crime or the length of time for which punishment may be imposed and not upon the place of punishment. The emphasis in modern penology is upon individualized treatment and the attempt is made to classify the criminal according to his needs rather than upon the character of the crime which he committed. It may be, under this new view, that a misdemeanant possesses certain traits or defects which would require a much longer course of treatment in his case than in that of a man guilty of a serious felony.

Under the Federal laws all crimes punishable by imprisonment for a term exceeding one year are felonies. It has been urged before the Commission that the term of punishment rather than the place should govern the definition and that it might be advisable to define felony as any crime for which a person could be imprisoned for a term greater than five years.

(3) To abolish entirely the distinction between a felony and a misdemeanor.

Such changes would have so far-reaching an effect upon the jurisdiction and procedure of our inferior and superior courts as to be inadvisable without further and extended study and more careful and critical examination of all criminal statutes than this Commission has been able to make.

The Commission recommends that G. L. Chap. 218, sec. 27, be amended by striking out the words "to jail or house of correction for a longer term than two years, or," so that the said section shall read: "They may impose the same penalties as the superior court for all crimes of which they have jurisdiction, except that they may not impose a sentence to the state prison for any term." A bill to accomplish this result is appended to this report and marked Appendix B.

The purpose of this recommendation is to give to the district courts equal power with the Superior Court to impose sentences in houses of correction and jails up to the maximum of two and one-half years as authorized by G. L. Chap. 279, secs. 19–23. At the present time district courts may impose sentences for no longer term than two years, although they may take jurisdiction in all cases of misdemeanors except conspiracies and libels and all felonies punishable by imprisonment in the state prison for not more than five years . . . G. L. Chap. 218, sec. 26. There seems to be no valid reason why the district courts should not be given the further power to sentence for an additional term of six months in such institutions, especially as their exercise of such power, in the absence of appeal, would tend to relieve the docket of the Superior Court. The result of this proposed amendment will be, not to extend the jurisdiction of the district courts, but to enlarge their powers of sentence over cases already within their jurisdiction.

The Commission further recommends that the following section be added to G. L. Chap. 279: —

> Except as provided in section two of chapter two hundred and sixty-four and section two of chapter two hundred and sixty-five of the General Laws, a person convicted of any crime punishable by imprisonment in the state prison may be sentenced to imprisonment in a jail or house of correction for not more than two and one-half years.

Under existing law many crimes named in the General Laws are punishable by imprisonment in the state prison, and, in the alternative, by imprisonment in the house of correction or jail for terms less than two and one-half years, or by fine. An example is to be found in G. L. Chap. 272, sec. 2, where abduction is punishable by imprisonment in the state prison for not more than three years, or in jail or house of correction for not more than one year, or by a fine of not more than $1,000, or by both imprisonment and fine. Under this section the court has no discretionary power to impose a sentence between one year in the jail or house of correction and a term of two and one-half years in the state prison, such term being the minimum state prison sentence authorized by law. The Commission believes that, where the court may sentence in the alternative either to the state prison or to the house of correction or jail, there should be no intervening term, to which the court could

not sentence, between the maximum in the house of correction or jail and the minimum term in state prison, but that the court should have the power to sentence from the minimum term in the jail or house of correction up to and including the maximum term in the state prison. No reason appears for refusing the court power to sentence for any particular term between these two limits.

The foregoing section is further proposed with the view of enlarging the discretionary power of the courts to sentence in crimes which have been regarded by the Legislature as sufficiently serious to warrant no sentence other than one in the state prison. Such crimes are usually of such a nature as to demand the imposition of a severe penalty. It is found, however, not only by the courts but by prosecuting officers, that exceptional circumstances sometimes exist where it is unjust to the defendant to sentence to the state prison, and where it would be desirable to give the power to the court to impose a shorter term in some other institution. At the present time, where defendants are within the requisite ages, the court may sentence to the Massachusetts Reformatory. If such sentence to the Massachusetts Reformatory, however, should not be the correct disposition of the case, the court has only the alternatives of putting the defendant on probation, filing the case, or of sentencing the defendant to a term in the state prison. The Commission believes that the court should be given a wider discretionary power of sentence.

G. L. Chap. 265, sec. 9, penalizes a fight by pre-arrangement by imprisonment in the state prison for not more than ten years, or by a fine of not more than $5,000. Section 11 provides that leaving the state to fight by pre-arrangement is punishable by imprisonment in the state prison for not more than five years or by a fine of not more than $5,000. These statutes apparently contemplate the existence of circumstances which make it advisable to impose a fine, rather than a state prison sentence. If, therefore, there may be circumstances which warrant a fine, the Commission feels that situations may exist which, while rendering a state prison sentence inadvisable, also make a fine inadequate. Therefore, the power should be given to the court to impose a sentence of imprisonment which would be deemed more severe than a fine, but less severe than imprisonment in state prison; in other words, a sentence to a jail or house of correction from one day to two and one-half years.

Many of the statutes where imprisonment in the state prison is the only punishment provided deal with offenses against the rights of property. It is illogical to say that an offender against the provisions of such a statute must not be given a sentence other than in the state prison for two and one-half years or more, when it is remembered that for manslaughter (G. L. Chap. 265, sec. 13) the penalty ranges from state prison for not more than twenty years down to the minimum jail sentence and fine; that the same penalties are provided for the crime of mayhem (G. L. Chap. 265, sec. 14) except that the maximum fine is $1,000 instead of $2,000 as in the case of manslaughter; that for assault with intent to commit murder or maim (G. L. Chap. 265, sec. 15) the punishment may be imprisonment in the state prison, or in jail and fine; that for attempt to murder by poisoning (G. L. Chap. 265, sec. 16) the punishment may be by imprisonment in state prison for not more than twenty years, or in jail for not more than two and one-half years and by fine of not more than $1,000; that for statutory rape, so-called (G. L. Chap. 265, sec. 23), the punishment may be by imprisonment for life in the state prison or by imprisonment in any other institution; and similar penalties are imposed for assault with intent to rape (G. L. Chap. 265, sec. 24).

Both reasons of the Commission for advocating the above proposed section are illustrated by G. L. Chap. 265, sec. 26, where the offense of kidnapping, or false imprisonment, is made punishable by imprisonment in the state prison for not more than ten years, or by a sentence in jail for not more than two years and by a fine; the foregoing penalties being imposed where there is no intent to extort money or property. Where the intent to extort money or property exists, the said section provides, as the only penalty, imprisonment in the state prison for not more than twenty-five years. Under the first part of this statute a defendant may be imprisoned in the state prison from two and one-half to ten years or in jail from one day to two years, but cannot be imprisoned for any term between two years

and two and one-half years. The above section would bridge that gap by giving the court power to sentence to the jail or house of correction for two and one-half years. The second part of said statute gives no discretionary power to the court to sentence under a minimum of two and one-half years in the state prison, and manifestly is inadequate to deal with cases of false imprisonment which may sometimes occur. The proposed section would enlarge the discretionary power of the court so that in exceptional cases jail or house of correction sentences might be imposed.

By the existing lack of discretionary power the court has been forced in some cases to put a defendant on probation, or to file the indictment, because of the injustice of sending him to the state prison for two and one-half years. In other cases, the court has been compelled to sentence a defendant to the state prison, where a fairer and more just sentence would have been a short term in some other institution. To remedy this situation, and to furnish the court with the means of rendering as exact justice as possible, the Commission makes this recommendation. It is not designed to minimize the seriousness of the crimes affected by the proposed section, but the Commission intends to make the imposition of penalties more elastic, so that the public on one side and the individual on the other may be dealt with more fairly. A bill to accomplish this result is appended to this report and marked Appendix C.

Objection has been made that this would result in the commitment of more men to jails and houses of correction who would otherwise be committed to the State Prison or other state institutions; that the jails and houses of correction as at present constituted are not in a position to receive and care for men serving substantial terms; and that many of them are not organized industrially or equipped with the necessary facilities for the schooling and recreation necessary where men serve terms of a year and over. The Commission does not pass upon the question as to the relative merits of state and county institutions. It assumes that the requirements of up-to-date penological treatment will be provided by the authorities having charge of these institutions and that the judges of our courts will by personal visit familiarize themselves with the conditions at all penal institutions to which they may make commitments.

It is further objected that the amendments in the statute proposed as above would change materially the intent of the legislature and that a blanket statute providing for the imposition of lighter penalties than those prescribed in the law in all cases would result in completely obliterating the distinction which the legislature had made between certain crimes with respect to the seriousness of their punishments. The answer to this is, it seems to the Commission, that the matter of classifying by crimes is becoming less important and that the court looks more today at the condition of the individual and his course of treatment.

Co-incident with the consideration of changes in the statutes to enlarge the power of district courts to send offenders to jails and houses of correction (see Appendix B) and a general amendment to allow all courts now having the power to send men to the State Prison also to sentence to jails and houses of correction for terms not exceeding two and one-half years (see Appendix C), it was urged that the minimum term of imprisonment in the State Prison should be reduced to one year, as it was prior to 1877 in this Commonwealth, or to some minimum term between one year and the present minimum of two and one-half years.

As it is now, in all cases where persons are sentenced from two and one-half years to some longer term, the minimum becomes a maximum (see G. L. Chap. 127, sec. 131). The deductions provided in G. L. Chap. 127, sec. 130 and the permits to be at liberty and releases on parole provided in sections 140 and 141 of the same chapter often make the time of actual incarcerations less than the maximum term of the sentence. To make sentences to the State Prison and jails and houses of correction really co-terminous, it is claimed that the State Prison minimum should be set at two rather than two and one-half years, on account of the application of the maximum and minimum sentence, as provided in G. L. Chap. 279, sec. 24. It was also suggested that if for the reasons already stated it is advisable to increase

the maximum sentence to jails and houses of correction it is also logical for the same reasons to allow judges to send men to the State Prison for shorter terms than at present.

The Commission does not deem it advisable at the present time to recommend a change in the State Prison minimum sentence.

Section 26 of Chapter 279 of the General Laws provides that a convict under sentence of imprisonment in the State Prison may be sentenced for a further time of not less than one year. Section 24 in the last sentence thereof provides that such sentence shall take effect upon the expiration of the minimum term of the preceding sentence.

This portion of section 24 may under some circumstances conflict with the provisions of sections 131 and 133 of Chapter 127 of the General Laws. These two latter sections provide that in all cases of plural sentences to the State Prison the minimum terms of the sentences shall be added together for the purpose of determining the time at which the person sentenced thereunder is to be released whether by parole or otherwise. They also provide that the persons sentenced thereunder shall be amenable to the laws contained in said Chapter for a term equal to the aggregate of the maximum terms of the sentences. Here as in other sections of the law the unique method of sentencing to the State Prison and the establishment of a different mode of sentencing to other state institutions has caused much confusion in the statutes. It is impossible to apply the provisions of sections 131 and 133 of Chapter 127 and at the same time carry out the injunction contained in the last sentence of section 24 of Chapter 279.

The Commission believes that persons held in the State Prison under more than one sentence should be regarded as serving a term equal to the aggregate of such sentences. The last sentence of section 24 is unnecessary and in order to harmonize the law we recommend that it be eliminated. A bill to bring about this result is annexed to this report and marked Appendix D.

Difficulty has been experienced by authorities in charge of penal institutions in determining the character of the crime where the mittimus describes it as an attempt to commit larceny. Chapter 279, section 33, provides as follows: — "Whoever is sentenced to the Massachusetts Reformatory for larceny or for any felony may be held therein for not more than five years unless sentenced for a longer term, in which case he may be held therein for such longer term; if committed to said Reformatory as a delinquent child he may be held therein for not more than two years; if sentenced to said Reformatory for drunkenness he may be held therein for not more than one year; if sentenced to said Reformatory for any other offence he may be held therein for not more than two years."

Chapter 274, section 6, defines the punishment for attempts to commit certain crimes. A consideration of the second and third clauses of this section indicates the importance of knowing what kind of a larceny it was attempted to commit, before being able to determine how long a person should be held in the Reformatory under section 33. See section 30 of Chapter 266.

The impossibility of determining the character of the larceny where the property is not actually stolen makes it likewise important to define whether under Chapter 274, section 6, the crime attempted to be committed would have been a felony or misdemeanor. For the purpose of clarifying the law in this respect and enabling those in charge of penal institutions to make the proper commitment in cases of this sort, it is proposed by the Commission specifically to define the character of the crime of attempting to commit larceny under section 30 of Chapter 266 of the General Laws and the punishment therefor. A bill to accomplish this result is annexed to this report and marked Appendix E.

The question of "from and after" sentences to the State Prison as explained elsewhere in this report is provided for by sections 131 and 133 of Chapter 127, from which it is clear that the parole may be figured upon the aggregate of the two sentences, provided the amendment suggested above is adopted.

The construction of the statutes with respect to parole from institutions other than the State Prison is not so clear, however. In the case of successive inde-

terminate sentences to the Reformatory or State Farm there is no statute which defines the power of the paroling authority with sufficient accuracy to prevent confusion.

Again, with reference to definite term sentences to county institutions, a difficulty has existed since an opinion was rendered by the Attorney General in 1921 (Op. A. G. February 1, 1921). Sections 140 and 141 of Chapter 127 provide for the release of persons sentenced on definite terms to county institutions and that the last six months of the definite sentences may be remitted with the approval of the Judge and the District Attorney or the Probation Officer. The opinion of the Attorney General above referred to was to the effect that the second of two "from and after" sentences could not take effect until the whole period of the first had expired. The result of this opinion is that no parole could be granted with any benefit on the first of two sentences because it would be necessary for the inmate released to be brought back after his parole period had expired to serve the time of his second sentence.

If this opinion were literally followed even more difficulty would be experienced in the case of successive indeterminate sentences but it would nevertheless seem to require that the whole maximum term of an indeterminate sentence should be served before the second sentence took effect. This would destroy the value of the indeterminate sentence and would render it not indeterminate but fixed.

Rather than seek to change the various sections having to do with state and county parole the Commission has drafted a bill which seeks to define the expiration of a sentence for the purpose only of ascertaining when a sentence to be served "from and after" the first sentence shall take effect. This, while in no way disturbing the present system of state and county parole, or in any way shortening, lengthening or affecting the quantum of parole will define more clearly the time at which parole from a second sentence is to attach. Draft of bill to accomplish this is annexed to this report and marked Appendix F.

Respectfully submitted,

JAMES M. SWIFT, *Chairman.*
ELIAS B. BISHOP.
SANFORD BATES.
HAROLD P. WILLIAMS.
RALPH W. REEVE.
HENRY C. McKENNA.

DECEMBER 15, 1923.

ADDITIONAL MINORITY REPORT.

The present statutory definition of felony has been in existence for more than seventy years and has been quoted and used in numerous decisions of our Supreme Judicial Court.

G. L. Chap. 274, sec. 1, defines a felony as "a crime punishable by death or imprisonment in the state prison" and a misdemeanor as any other crime.

G. L. Chap. 279, sec. 33, however, provides that "whoever is sentenced to the Massachusetts Reformatory for . . . any felony may be held," etc. In other words, the definition of felony commences to lose its accuracy and usefulness when it is provided that men may be sent to other institutions for crimes which are classified as felonies because they may be sent to the State Prison.

A further confusion in this situation is made apparent by consideration of G. L. Chap. 279, sees. 18 and 19. Section 19 provides that a woman convicted of a felony shall be sent to the Reformatory for Women; and section 18 provides that a woman sent there for a felony shall be held not more than five years, unless she is sentenced for a longer term . . . Moulton vs. Commonwealth, 215 Mass. 525, holds that a woman felon may be sent nowhere but to the Reformatory for Women.

We thus have a situation whereby a woman is a felon because she has committed a crime which may be punishable in the State Prison, and yet she cannot be sent there.

While it is not deemed advisable to recommend any substantive change at present in the definition of the word "felony", we believe that confusion exists with regard to the application of these statutes and that this confusion might be minimized by the insertion of certain words in G. L. Chap. 274, sec. 1. If after the word "crime" in said section there were to be added the words "which if committed by an adult male person would be" the meaning would be clearer. The anomalous situation with regard to female and juvenile felons would be relieved and so far as we now see no serious dislocation of penal statutes would result. We therefore recommend legislation as provided in the bill annexed to this report and marked Appendix A.

JAMES M. SWIFT.
SANFORD BATES.

Appendix A.

An Act changing the Statutory Definition of Felony.

Be it enacted, etc., as follows:

Chapter two hundred and seventy-four of the General Laws is hereby amended by striking out section one and inserting in place thereof the following: — *Section 1.* A crime which if committed by an adult male person would be punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors.

Appendix B.

An Act to enlarge the Jurisdiction of the Justices of Inferior Courts in the Matter of Sentences.

Be it enacted, etc., as follows:

Chapter two hundred and eighteen of the General Laws is hereby amended by striking out section twenty-seven and inserting in place thereof the following section: — *Section 27.* They may impose the same penalties as the superior court for all crimes of which they have jurisdiction, except that they may not impose a sentence to the state prison for any term.

Appendix C.

An Act to provide Alternative Sentences for Crimes now punishable by Imprisonment in the State Prison.

Be it enacted, etc., as follows:

Chapter two hundred and seventy-nine of the General Laws is hereby amended by inserting after section seven the following new section: — *Section 7A.* Except as provided in section two of chapter two hundred and sixty-four and in section two of chapter two hundred and sixty-five, a person convicted of any crime punishable by imprisonment in the state prison may be sentenced to imprisonment in a jail or house of correction for not more than two and one-half years.

Appendix D.

An Act regulating the Term of Imprisonment in the State Prison.

Be it enacted, etc., as follows:

Section twenty-four of chapter two hundred and seventy-nine of the General Laws is hereby amended by striking out the last sentence of said section so as to read as follows: — *Section 24.* If a convict is sentenced to the state prison, except for life or as an habitual criminal, the court shall not fix the term of imprisonment, but shall fix a maximum and a minimum term for which he may be imprisoned. The maximum term shall not be longer than the longest term fixed by law for the punishment of the crime of which he has been convicted, and the minimum term shall not be less than two and one half years.

Appendix E.

An Act to regulate the Punishment of Attempts to commit Certain Larcenies.

Be it enacted, etc., as follows:

Chapter two hundred and seventy-four of the General Laws is hereby amended by striking out section six and inserting in place thereof the following: — *Section 6.* Whoever attempts to commit a crime by doing any act toward its commission, but fails in its perpetration, or is intercepted or prevented in its perpetration, shall, except as otherwise provided, be punished as follows:

First, by imprisonment in the state prison for not more than ten years, if he attempts to commit a crime punishable with death.

Second, by imprisonment in the state prison for not more than five years or in jail for not more than two and one-half years, if he attempts to commit a crime, except any larceny under section thirty of chapter two hundred and sixty-six, punishable by imprisonment in the state prison for life or for five years or more.

Third, by imprisonment in jail for not more than one year or by a fine of not more than three hundred dollars, if he attempts to commit a crime, except any larceny under section thirty of chapter two hundred and sixty-six, punishable by imprisonment in the state prison for less than five years or by imprisonment in jail or by a fine.

Fourth, by imprisonment in a jail or house of correction for not more than two and one-half years or by a fine, or by both such fine and imprisonment, if he attempts to commit any larceny punishable under section 30 of chapter 266.

Appendix F.

An Act to determine the Time of the Taking Effect of a "From and After" Sentence.

Be it enacted, etc., as follows:

Chapter two hundred and seventy-nine of the General Laws is hereby amended by inserting after section eight the following new section: — *Section 8A.* For the purpose only of determining the time of the taking effect of a sentence which is ordered to take effect from and after the expiration of a previous sentence, such previous sentence shall be deemed to have expired when a prisoner serving such previous sentence shall have been released therefrom by parole or otherwise. Nothing in this section shall be construed to alter or control any provision of section one hundred and thirty-one or section one hundred and forty-nine of chapter one hundred and twenty-seven.

SENATE No. 41

The Commonwealth of Massachusetts

REPORT

OF THE

COMMISSION ON JURY SERVICE

APPOINTED UNDER CHAPTER 53 OF THE SPECIAL ACTS AND RESOLVES OF 1923

DECEMBER 15, 1923

COMMISSION ON JURY SERVICE.

From the Senate.

HON. WALTER SHUEBRUK OF COHASSET, *Chairman.*

From the House.

REP. MERLE D. GRAVES OF SPRINGFIELD.
REP. M. SYLVIA DONALDSON OF BROCKTON.

By the Governor.

T. HOVEY GAGE, ESQ., OF WORCESTER.
THOMAS W. PROCTOR, ESQ., OF NEWTON.
EDITH M. HAYNES OF BOSTON.
FREDERICK W. MANSFIELD, ESQ., OF BOSTON.

JOHN D. WRIGHT OF BROOKLINE, *Secretary.*

CONTENTS.

The Commonwealth of Massachusetts

BOSTON, December 15, 1923.

To the General Court of Massachusetts:

In accordance with the provisions of chapter 53 of the Special Acts and Resolves of 1923, I have the honor to transmit herewith the report of the Commission on Jury Service.

Respectfully,

WALTER SHUEBRUK,
Chairman.

The Commonwealth of Massachusetts

CHAPTER 53.

RESOLVE PROVIDING FOR AN INVESTIGATION AS TO JURY SERVICE IN THE COURTS OF THE COMMONWEALTH AND AS TO MAKING WOMEN ELIGIBLE FOR SUCH SERVICE.

Resolved, That a special unpaid commission, to consist of one senator to be designated by the president of the senate, two representatives to be designated by the speaker of the house, and four other persons to be appointed by the governor with the advice and consent of the council, shall investigate the subject of jury service in the courts of the commonwealth, with special reference to the changes in the jury system recommended by the attorney general in his report for the year ending January seventeenth, nineteen hundred and twenty-three, and to the service of women on juries, and to what extent existing court house and other facilities may require enlargement or alteration if women are to be made eligible for such service. The commission shall be provided with quarters in the state house, may require the attendance and testimony under oath of witnesses and the production of books and papers, and may expend for clerical assistance and for other expenses, such sums as the governor and council may approve. Any member of the commission may administer oaths to witnesses. It shall report the results of its investigations, with drafts of proposed legislation embodying the same, to the general court on or before December fifteenth, nineteen hundred and twenty-three. [*Approved May 14, 1923.*

REPORT OF THE COMMISSION ON JURY SERVICE.

It is not surprising since all of our social and political institutions are, in a sense, constantly on trial, that one of the most important, the jury system, should receive its share of criticism. There was, however, a considerable shock to the greater part of the community when the chief law officer of the Commonwealth reported to the Legislature in January 1923 that in the two largest counties, Suffolk and Middlesex, the jury system, because of maladministration or worse, had actually broken down. For what was said many years ago in England might well be applied to the people of this Commonwealth, namely, that "Trial by jury is that point of their liberty to which the people are most thoroughly and universally wedded."

Imperfect, as all human institutions must of necessity be, the jury system has, nevertheless, for centuries proved to be the greatest single security to man for the enjoyment of life, liberty and property. It was inconceivable that the people of this Commonwealth would ever consent to give it up; if the system had actually broken down because of indifference or corruption there was indeed cause for alarm and need of immediate action.

The members of the Commission approached the task which had been committed to them, viz., to "investigate the subject of jury service in the courts of the Commonwealth", sensible of the importance of the problem and of the difficulties confronting them.

Present Jury Law.

The present laws providing for the administration of the jury system may, in a broad way, be grouped into three parts:

(1) The sections which provide for the annual preparation in

each city and town of the original lists of those liable to be called for jury service during the year. The preparation of these jury lists is entrusted to election commissioners in cities having such boards, to boards of registrars of voters in other cities and to boards of selectmen in towns.

(2) The sections which provide for placing all the names on these jury lists in a receptacle and drawing out by chance a certain number when called for periodically by the various clerks of courts. This duty is placed upon the mayor and aldermen (or similar body) in cities and upon the selectmen in towns.

(3) The sections which provide for the drawing of the names in court for service on a particular jury and other details of service.

These provisions of law had their inception in Colonial times and although during the latter part of the 18th century and up to recent years, they have been frequently amended, enlarged and clarified, they have retained for well over a century the fundamentals of the original jury system of the Commonwealth.

Organization and Proceedings of the Commission.

The Commission met on August 7th, for organization and thereafter applied itself, individually and collectively to an investigation as to whether these laws had broken down; and if so why and what remedies could be suggested.

The Commission has held eleven hearings, in addition to many executive meetings and conferences. A questionnaire was prepared and sent to the various clerks of courts of all the other states, to ascertain their practice in respect to the selection of jurors; data on file in the Attorney General's office relative to the jury systems in the other states was placed at the disposal of the Commission; and statutes of the various states were compiled. The Commission enlisted the cooperation of various individuals and groups believed to be particularly concerned with the jury problem. Letters were sent to the boards of registrars and election commissioners of the various cities and to the boards of selectmen in all towns in the Commonwealth, soliciting such aid, suggestions and recommendations as

they might be disposed to offer; similar letters were sent to the clerks of courts in the several counties and later, at the invitation of the Commission, a conference with several clerks of courts was held at the State House.

The Commission communicated with the Bar Associations in the state and was frequently in conference concerning the matters before it with the Massachusetts Bar Association and the Boston Bar Association, its officers and members.

Various women's organizations were consulted by the Commission with reference to the service of women on juries and the County Commissioners of the several counties were requested to submit estimates of the cost of altering the court houses so as to provide adequate facilities, should women be made eligible for jury service.

On September 11 the Commission held a public hearing at which were present former Attorney General Allen, members of a committee from the Boston Bar Association, some members of the boards of registrars of cities or their representatives and other individuals.

September 12 was devoted to hearing from the general public such recommendations as they cared to submit.

A public hearing was assigned for September 18, which was confined to the question of service of women on juries. The League of Women Voters was in charge of the proponent's side and a number of the members of that organization spoke, as well as other representative women.

The selection of jurors in Suffolk County was the subject of a hearing on September 19. The board of election commissioners of Boston discussed with the Commission the methods of selecting and drawing jurors in Boston. Members of the boards of registrars of Revere and Chelsea and representatives of the selectmen of Winthrop also appeared on this date.

Boards of registrars from the cities in the Commonwealth were requested to appear before the Commission on September 25 and 26. On these two dates members of the boards of registrars or city clerks from twenty-nine cities were either present or represented. The question of selecting jurors in their various municipalities was discussed with the view of determining whether or not the laws were being complied with in

all cases and if the present practices were uniform and satisfactory.

On September 28 the Commission held a hearing for the selectmen of seventeen representative towns.

The discussions at these hearings were not confined exclusively to methods of selecting jurors, but the subject of jury service in general was gone into fully and many of those who appeared and testified expressed themselves frankly on the questions before the Commission.

At the suggestion of the Commission, Attorney General Benton called a conference of the district attorneys on September 26, at which time the questions before this Commission were taken up and discussed at length. As a result of that conference, the Attorney General submitted to the Commission certain recommendations on which the law officers present at the conference were in accord.

On September 29 the Commission held a public hearing, at which the Attorney General and several of the district attorneys were present. The results of the conference were presented by Attorney General Benton to the Commission and several of the district attorneys presented their individual suggestions and recommendations for changes in the system. Written recommendations were received from the district attorneys who found it impossible to attend the public hearing.

General invitations were extended to practicing attorneys, members of the judiciary, public officials and others to appear before the Commission at public or private hearings and the Commission takes this opportunity of expressing its appreciation for the helpful suggestions, as well as for the encouragement received, from the many citizens, officials and members of the bar who were willing to devote some of their time and energy in helping to share its burdens.

Conclusions.

The Commission has thoroughly investigated the subject of jury service in the courts of the Commonwealth with special reference to the changes in the jury system recommended by the attorney general in his report for the year ending January

17, 1923, and is in possession of all material facts relating to the operation of the system.

Certain instances of jury action were related to the Commission where, it was alleged, there had been miscarriages of justice. There was not sufficient evidence, however, to justify the Commission in concluding that there had been any miscarriages of justice; or, even if there had been, whether they were due to defects in the jury system, to the incompetence of a particular jury or to some cause entirely foreign to the issue and the parties involved. A few isolated instances indicated that possibly some juries had erred; that the jury system in this Commonwealth had not secured perfect justice in every case. In the opinion of the Commission they indicated nothing more On the other hand, the testimony from attorneys constantly trying causes for plaintiffs or for defendants before our juries, from attorneys general and district attorneys past and present, from clerk of courts and from many others was almost unanimous to the effect that our jury system, although not perfect and although susceptible of improvement in certain particulars, is, nevertheless, functioning fairly well for a human institution.

As a result of its investigations and study and from the great preponderance of the evidence before it, the Commission is satisfied and reports unanimously that the jury system in Massachusetts has not broken down. At most it may be said that the system is suffering from occasional neglect and inattention on the part of some of the officials who are charged with its administration and from that lack of perfection in operation which is frequently found and must be expected in any political institution, when too much is taken for granted, when "eternal vigilance" is relaxed and when we rely upon laws alone to protect our rights and liberties.

In all the testimony before the Commission no fault was found with the methods of drawing the jurors for a particular jury after they had appeared in court. Some of the details of service, as to compensation, accommodations and other matters will be dealt with later in this report.

Except for the fact that there appears to be unnecessary

expense and expenditure of energy and a considerable lack of uniformity, there is little to be criticized in the methods by which the venires are publicly filled from the jury lists by the mayors and selectmen. Suggestions for simplifying the present practice appear later in this report.

The opportunity for real improvement in our jury system is in the initial step, when certain citizens are selected each year by election commissioners, registrars of voters or selectmen to make up the jury list in their city or town. The law provides that these officials shall "prepare a list of such inhabitants of the city or town, of good moral character, of sound judgment, and free from all legal exceptions, not absolutely exempt from jury service as they think qualified to serve as jurors." (G. L. Chapter 234 sec. 4). The Commission, after full deliberation, is unable to suggest to the Legislature any words which would more accurately define by statute what should be considered the qualifications of prospective jurors.

It is presumed that few realize better than the members of the Legislature to whom this report is addressed that the efficacy of any statute lies, not so much in the words of the statute itself, as in the manner and sincerity with which it is administered.

The Commission holds in high esteem the opinions of the eminent former attorney general, whose report it has under consideration and has deliberated at length upon his suggestion that the administration of our jury laws would be vastly improved by taking it out of politics — by taking it out of the hands of elective officers or their appointees and placing it in charge of a state commission appointed by the Chief Justice of the Supreme Judicial Court or in charge of a commission consisting of "a justice of the Supreme Judicial Court, a justice of the Superior Court, the clerk of the Supreme Judicial Court for the Commonwealth and two paid members to be selected by them." (Attorney General's Report, 1923, page XLIII).

The Commission is doubtful whether any political institution should or can be taken out of politics; but obviously there would be little gained by taking the duty of preparing our jury lists from one political body and assigning it to some other political body as, for example, a state commission or county

commissions, the members of which are to be elected or appointed by an elective officer.

The Commission discussed the questions involved with many of the local town and city officials whose duty it is to prepare the jury lists. Among the various officials there were discovered doubts and differences of opinion as to interpretations of the laws and their duties and a varying degree of interest in the performance of their duties; but in general there appeared to be an earnest desire to make up "a good jury list" without fear or favor. There is no reason to suppose that the work of any state or county commission similarly constituted would show any improvement over the present work of the local boards, except possibly in the uniform administration of the laws, a question which will be considered later in this report.

The only other method suggested for the preparation of the jury lists is to place it in the hands of the judiciary or their appointees, as recommended in the report of the former Attorney General. This system is in operation in many states and to this recommendation of the former chief law officer, which was concurred in by some others, the Commission has given its most careful consideration.

This recommendation means that a system which has grown up with the Commonwealth and its increase of population, which extends over its entire territory, and which seems to all the Commission to work in general reasonably well and which, with the suggested changes in the law can be made to work better, should be done away with and in its place a new system set up.

The Commission is opposed to this proposition and does not recommend it. The Commission considers that the selection of those who are to be the judges of the facts is a political act of the people in the administration of the people's justice — not a partisan political act, but a political act none the less. The Commission thinks it is the duty of the people acting by its duly elected representatives to present to the Court that part of the people who are to act as the triers of the facts. When these triers of the facts are lawfully in Court in obedience to the laws of the people they are to perform their high duty under the direction of the judges in the manner prescribed

by law. In this selection of the triers of the facts the judges themselves should have no part. They should, speaking with the utmost respect, be confined to the performance of their strictly judicial functions. In this way the Commission believes that justice will be attained to the greatest satisfaction of the people — whose justice it is.

The Commission has, indeed, found little excuse for abandoning the present system for the selection of jurors in Massachusetts and believes that the Legislature should use the utmost endeavor to improve the administration of the present laws, leaving the system fundamentally as it is today and as it has been since the early days of the colonies and of the Commonwealth.

The Commission believes that there clearly are opportunities for improving the administration of the present system and it is accordingly prepared to make certain recommendations for amendments of the existing statutes.

Recommendations.

As has already been intimated, perhaps the most serious shortcoming in the administration of our jury system, is in the selection by some local boards of the citizens whose names are placed on the jury lists. When conditions were such that the boards knew nearly everybody in their city or town, either personally or by reputation, or even if they knew a sufficient number of the inhabitants to satisfy the statute requiring that not less than one in each one hundred should annually be placed on the jury list, — in those days it was comparatively easy to select enough men "of good moral character, of sound judgment and free from all legal exceptions" to fill the jury lists. With increasing population, however, and with the growth of large cities and towns, together with the greater number of jurors called for service each year, personal acquaintance by the boards with all those whose names must go on the jury lists has become an obvious impossibility.

The boards have rarely been furnished by their municipalities with any funds for carrying on investigations as to the fitness of prospective jurors; many members of the boards are so underpaid that it could hardly be expected that they would

personally make any extensive investigations; and the result has been, especially in the cities and large towns, that the boards have from necessity put men on jury lists who are unknown to them except for such meagre information as might be gathered from directories or official records as to a man's age, occupation, place of residence and length of residence in the city or town and whether he is a registered voter or has a criminal record.

One further source of information is provided by the law which requires the chief of police to give the board all possible assistance in making such investigation. It is the common practice in the cities and large towns for the boards to request the police department to report as to each man whose name appears on the jury lists, whether he would make a good juror. Undoubtedly this procedure helps the boards in determining whether the prospective juror is "of good moral character" and "free from all legal exceptions," but it can hardly be contended that it is in all cases a satisfactory method of determining whether he is "of sound judgment."

The Commission believes that a great deal can be accomplished towards improving the standard of our juries by restoring, so far as possible, the conditions which prevailed when the boards had personal knowledge of every one whose name was placed on the jury list. It therefore recommends that section 4 of chapter 234 of the General Laws be amended so as to provide that the board shall not place the name of any person on a jury list unless such person is determined by the board to be qualified in the manner prescribed by law upon the personal knowledge of one of its members or after personal appearance before the board; and that the boards be given adequate authority to carry out such a provision by means of summons and, if necessary, examination under oath. (Appendix A, sec. 4).

Undoubtedly this will entail more work on the part of the boards and increased expense, but the Commission is confident that this will be fully justified by the results. Our communities should be willing to pay the expense of properly sifting the inhabitants, so as to obtain those best qualified to serve as jurors; and they should be willing to pay the election commis-

sioners or other officials, whose duty it is to select the jurors, compensation commensurate with the importance and dignity of the work they are called upon to perform.

The Commission believes that all persons qualified to vote for representatives to the General Court, and otherwise eligible for jury service, should be liable to serve whether registered as voters or not, and therefore recommends an amendment to section one of chapter two hundred and thirty-four of the General Laws (Appendix A, sec. 1).

There appears to be a general practice by each board to establish some minimum age for service, varying from twenty-four or twenty-five to thirty. The present maximum age at which a person is exempted from jury duty is 65 but it was the general opinion of those who appeared before the Commission that persons between the ages of 65 and 70 are fully capable of rendering efficient jury service. The Commission recommends that the minimum age be established by statute at twenty-five and that the maximum age be extended from sixty-five to seventy. (Appendix A, sec. 1).

The question of exemptions was very carefully considered. Exemptions from jury service have been established, not as a matter of privilege but on the theory that the community is better served by leaving certain of its members free to pursue their vocations without the interruptions which would be caused by even occasional jury service. Civil, judicial and military officers; doctors, ministers, teachers, railroad engineers, firemen etc.; the justification for each exemption rests on its own special set of facts and varies in degree. Perhaps all exemptions, as was suggested by some, could be abolished. The result undoubtedly would be that many men who would make excellent jurors and who are now exempt by statute would be available for service. Certain other services, however, which the safety and well being of society require as much as it requires jury service would be interrupted. How much would be gained for jury service and how much lost to the community in other ways, it is impossible to say. This much is certain, however, that if all exemptions were removed the number of citizens thus made liable for jury service would be

insignificant as compared with the total number who are at present liable. The list of exemptions is fairly long but the number of citizens exempted is almost negligible. Weighing all the arguments, the Commission believes that very little can be accomplished by striking out any of the exemptions provided by the present law and recommends only two slight changes; the first to make it clear that members and officers of the Senate and House of Representatives shall be exempt at all times, by striking out the words "during a session of the General Court"; and the second, restricting exemption to commissioned officers of the volunteer militia, instead of granting it to all members. (Appendix A, sec. 1).

Although the Commission did not hear any serious complaint of what are known as "professional jurors", that is, men who by some means or other appear on the juries year after year, it is an evil which apparently exists to some extent in some communities. Furthermore, it appears to the Commission that jury service, or at any rate the liability for jury service, should be extended throughout the community as widely as possible among those eligible for such service, and that the boards should not year after year make up their jury lists containing the same names as in previous years. To accomplish these results the Commission recommends that it be provided that if a person's name is placed on a jury list and he is not drawn for service, his name may be placed on the list for either or both of the two succeeding years, but after the third year his name shall not be placed on the jury list for a period of three years; and that in any event his name shall not appear on the jury list more than three times in any six year period. It seems to the Commission that this will ensure an entirely new list of names every three years and will help to improve the situation. (Appendix A, sec. 2 and 4).

The Commission places no credence in reports so frequently circulated, some of which were brought to the attention of the Commission, that favoritism, manipulation, possibly even corruption exists in some places, during the process of drawing the names on a venire. It did appear, however, that there was unusual lack of uniformity in interpretation of the statutes govern-

ing this procedure; and also that the statutes now existing and as generally interpreted require an entirely unnecessary expenditure of time and effort, which of course means expense.

Some officials write each name upon a separate piece of paper and fold the paper once; others write the names on stiff cards without folding; others write the names on pieces of paper and roll the paper enclosing the whole with an elastic band; some thrust the rolled or folded paper through a brass ring. It seems obvious that if the names are written on stiff cards and then placed in the box the cards may adhere to each other and not be thoroughly mixed even if the box is shaken or revolved. As to folded papers, the possibility of the papers becoming interlocked where they are folded, thus preventing thorough mixing, seems evident. The plan of rolling the ballot and then encircling the rolled paper with an elastic band or brass ring or similar device, seems more acceptable than folded paper or stiff cards simply because when so rolled and enclosed the ballots can be more easily mixed and there is less tendency for them to cling together in the box; but still there is the possibility that the ballots may fall out of the encircling bands.

Placing each separate ballot in a gelatine capsule was considered and met with much favor with the members of the Commission, but as the procedure was explained there was a great deal of work and detail necessary in connection with the preparation of the ballots. The Commission then sought for some means of accomplishing the same results without using the paper ballots at all.

It was explained by the Election Commissioners of Boston that in Boston it is customary to have the names of the persons who have been selected for the jury lists printed or typewritten on sheets of paper of uniform size and divided lengthwise down the center and several times across the page, a single name appearing in each division of the paper thus marked off. A great many sheets are thus used until all of the names on the lists, amounting to about nine thousand, are transferred to these ruled sheets, when they are all placed in a package and sent to the printing department where they are cut with a paper cutting machine once down the center on the ruled line and

then across on the transverse lines, thus transforming the sheets to individual ballots with one name on each ballot. These ballots are then put into bags and taken to the Election Commissioners' office where they are emptied upon a long table, thoroughly mixed, folded so as to conceal the names, and then placed in baskets. These ballots, thus folded, are transferred to the jury box in the City Clerk's office, there to await the drawings by the Mayor and members of the City Council.

It seems to the Commission that a good deal of this complicated and expensive procedure could be saved by giving each name upon the jury list prepared by the Election Commissioners a consecutive number and by having metal discs of a uniform size prepared, bearing corresponding numbers. Placing the discs in the jury box in the City Hall, all the intervening labor necessary in the preparation of ballots would be eliminated. The jury box containing the discs, of course, would be kept locked at all times, the key to be in the possession of the City Clerk, in accordance with the custom which obtains now. Whenever there was to be a drawing for juries a lid in the box would be opened and the Mayor, or some Councilman designated by him, would put his hand into the box and draw one disc and immediately call the number upon the disc. He would then hand it to the Mayor who would examine it and verify the number called and he in turn would hand it to the City Clerk who would repeat the number aloud and then, consulting the jury list which he has in his possession, call the name to which such number was assigned.

The Commission is satisfied that this plan would be more simple and economical than the various methods now in use throughout the Commonwealth and recommends legislation providing for this system of drawing names from the jury lists. (Appendix A, secs. 6, 10, 11, 12, 13).

The Commission believes that considerable improvement in the calibre of our jurors can be attained by making the service more attractive and its performance less arduous and exacting. It believes that much can be accomplished by educating the people to an appreciation of the importance and dignity of the service.

The County Commissioners, who have charge of the court houses, should at all times make the physical conditions of jury service as attractive as possible. Clean and comfortable quarters are to be presumed. In some states jurymen are furnished with telephone, messenger and stenographic service and with recreation and reading rooms; in some states the jury rooms are referred to as "chambers of horrors." The reaction on the public mind as to the meaning of "jury service" is obvious.

Suggestions were made, and seriously considered by the Commission, that pamphlets containing instructions and advice should be sent to prospective jurors or that the summonses should explain to the jurors the importance of the service which they were called upon to perform. It seems impracticable to incorporate anything of this sort in the statutes but the Commission does believe that considerable benefit would be rendered by a studied and uniform attempt on the part of the judges to carry this message to the people, not only by general instructions to the jurors after they have appeared in court, but better still by means of some communication to be delivered to the juror when he is summoned, possibly even to be incorporated in the summons itself. At least such procedure might eliminate many requests to be excused.

As to the foregoing suggestions the Commission feels that it has no authority to make specific recommendations. It has, however, certain recommendations which it believes will lessen the general desire to escape or evade jury service.

Although it is plain that the rate of compensation cannot be adequate in all cases and that the value of jury service cannot be measured in dollars and cents, the Commission believes that the pay should conform somewhat more closely than at present with the "going wage" and recommends that the pay for jury service be increased from four to five dollars a day for ordinary jurors and from five to six dollars for jurors in capital cases, where the jurors are confined. (Appendix A, sec. 20). The compensation at present established for travel, — twelve cents a mile out and back once each week, — is in some cases adequate; but in many cases it is wholly inadequate. Here is a difficult problem of adjustment between the taxpayer and the

public servant. In some counties a juror actually travels twice as many miles as the pay roll shows; in some cases it is impossible for a juryman to return to his home and the entire week's compensation for travel may be used in securing a night's lodging. In view of the present railroad tariffs, the Commission recommends that jurymen be allowed four cents a mile out and home for each day of service and if the expense necessarily and actually incurred for transportation out and home once in each day exceeds the amount of this allowance, that they be allowed the amount of such expense. (Appendix A, sec. 20).

The foregoing recommendations as to per diem and travel compensation are based entirely upon the theory that the people are willing to treat fairly those who serve them and, regardless of the cost to the counties, will not ask jurymen to pay out of their own pockets the actual expenses of service. It is reassuring to have figures from the Division of Accounts indicating that the additional cost of the suggested increase in the per diem and travel compensation would not exceed $150,000. a year.

The length of service presents an important and puzzling question. The minimum of service required anywhere, so far as the Commission is aware, is one week. In Massachusetts the service may extend from thirty days to twelve weeks, according to the county and the session of court which the juror is summoned to attend. There is something to be said against too short a term of service, since a juror hardly becomes acquainted with his job until he has served on at least two or three cases. On the other hand, it may be of the gravest concern to some whether they are called upon to sacrifice one, two or three months in the public service. It also appears that in many instances those summoned for jury service are perfectly willing to sit for the maximum term of service. Weighing all of the conflicting arguments, the commission recommends that, on his own request, a juror shall be excused after twenty days attendance. (Appendix A, sec. 3).

Further accommodation can be extended to a prospective juror by notifying him as soon as possible that he is liable to

be drawn. The Commission recommends that notice be sent to the person as soon as his name is placed on the annual jury list. (Appendix A, sec. 4). Also that when drawn for service he be given at least fourteen days' notice. (Appendix A, sec. 15). These changes would require amendments in other sections of the law relative to the drawing of jurors, etc. (Appendix A, secs. 14, 22, 23).

It seems to the Commission that the printed jury lists should contain some more specific information as to the person's employment and the Commission therefore recommends that such lists state the work which he is engaged in and the name and business of his employer, if any. (Appendix A, secs. 5, 8, 16).

In order to clarify and strengthen the provisions prohibiting requests to be put on or kept off a jury list; and the provisions prohibiting improperly putting any one on or keeping any one off a jury list, and to provide penalties for violation of any of the requirements of the statute, the Commission recommends certain further amendments. (Appendix A, secs. 17, 18 and 19).

Section 9, chapter 234 of the General Laws is obsolete and the Commission recommends that it be repealed. (Appendix A, sec. 9).

In the opinion of the Commission, the adoption of the foregoing recommendations would help considerably to improve the administration and operation of the jury system in Massachusetts.

More particularly, however, as has already been pointed out, it seems clear to the Commission that the making up of the annual jury list should be improved. The Commission believes that this work could certainly be made less casual and more uniform if there were some supervising officer whose sole duty it was to oversee the selecting boards, advise them and report to the Legislature annually. It seems that this duty, if industriously attended to, by circularization, by visiting the selecting boards, by examining their methods, by investigation in the courts and by reporting good results and the contrary (if such appeared) with the necessary publicity could not fail to bring about uniformity in carrying out the provisions of law and with it improvement in the class of jurors selected.

It seems that this service could be performed acceptably and well by one competent officer and that to avoid duplication and expense he should be attached to some appropriate department of the Commonwealth already having an organization for assistance in matters of correspondence and office work. He should have an adequate salary and be appointed by the governor by and with the advice and consent of the council for a term of three or five years in order to assure the importance, permanency and dignity of the office. The Commission strongly urges the trial of such a system believing that it will be productive of favorable results. Provision is made in the accompanying act for such an officer together with a definition of his powers. (Appendix A, sec. 21, also secs. 5, 7, 13).

An interesting suggestion was presented to the Commission that provision should be made for "special" or "picked" juries, a system which is used in England and in some of our states. In general, with, of course, a wide variety of details, the system provides that a special jury list is prepared composed of men qualified by training and experience to pass on more intricate cases of a commercial nature. Parties litigant may, by agreement or by direction of the court, and upon payment of the additional expense, have a jury drawn from this special list of jurors. Apparently the system has given a certain degree of satisfaction where it has been tried but it seems to the Commission that if there is any general desire to introduce it in Massachusetts it should be done by special petition to the Legislature and not as the result of recommendations of this Commission. The Commission therefore makes no recommendation regarding this proposal.

Jury Service for Women.

The Commission was also instructed to investigate the subject of "the service of women on juries."

On this question a majority of the Committee report that women shall be eligible in the Commonwealth of Massachusetts for jury service, but shall be exempted on their own request. (Appendix B, page 64).

In order that the position of the Commission may be properly explained, however, it is fair to say that this vote was recorded

only after the Commission had voted four to three not to make women eligible for jury service on the same basis that men are now eligible; that is, that all women, subject to certain exemptions, as in the case of men, should not be compelled to serve on juries. The three members who voted in favor of compulsory service, later voted for optional service, not because they believe in optional service, but because they believe it is one step in advance over the present system, under which no women are allowed to serve. On the other hand, three of the four members who voted against compulsory service — that is, the three who voted against optional service — while believing that no women should serve on juries (at least for the present) nevertheless believe that there should not in any event be any option, but that if women are to be eligible for jury service at all it should be on the same basis as men's service.

In other words, six members of the Commission believe that if women are to be made eligible to serve, the service should be compulsory with appropriate exemptions; of these six, however, as has been stated, three members believe there should be no jury service for women and the other three are willing to have optional service for women rather than no service at all. The seventh member of the Commission, Rep. M. Sylvia Donaldson, believes that optional service for women is the only proper solution of the problem and her opinion appears later in this report.

The opinions of Messrs. Gage, Proctor and Mansfield, who are opposed to any jury service for women, and the opinions of Miss Haynes and of Messrs. Shuebruk and Graves, who are in favor of compulsory service for women and in favor of optional service only as a compromise, also appear later in this report.

It is perhaps needless to say that the Commission regrets that it is unable to furnish a positive and unanimous recommendation on this phase of its investigations.

Court House Alterations.

The Commission was also instructed to investigate "to what extent existing court houses and other facilities may require enlargement or alteration if women are to be made eligible for such service."

This proved to be a rather more technical assignment than was, perhaps, anticipated by the Legislature. Court houses containing the rooms for jury trials and the accommodations for juries are all under the supervision and control of the various County Commissioners, except in Suffolk County where the court house has recently (Acts of 1922, Chapter 525) been put in charge of the sheriff. The Commission accordingly undertook to enlist the cooperation of these authorities to determine the cost of alterations which would provide accommodations for women jurors, such as it considered imperative. Early in its investigations it became apparent, however, that the estimates from these authorities were in many instances so largely controlled by the zeal with which they opposed the service of women on juries that it was impossible to secure reasonably accurate figures for the entire Commonwealth in this manner.

The Commission considered the advisability of conducting an independent investigation by engaging architects and engineers to make a study of the twenty-two court buildings in the Commonwealth. Of course, this would have entailed a large expense and since there was no assurance that any plans they might prepare would ever be needed, or if needed that they would meet with the approval of the authorities in charge of the buildings, this idea was abandoned.

After due consideration the Commission is satisfied that any one of the county court houses can, if it should become a matter of necessity, be altered speedily and at a reasonable expense so as to provide accommodations for women jurors which, if not as comfortable and attractive as might be desired, would be decent and at any rate would compare favorably with the accommodations to which men jurors in many court houses are now compelled to submit.

The Suffolk County court house, where many branches of state and county judicial systems are gathered together, pre-

sents a problem immeasurably more difficult than any which exists elsewhere in the Commonwealth. The Commission is satisfied that what can be done in that court house can be done in any court house and is fortified in this opinion by estimates received from some County Commissioners who cooperated with this Commission in its enquiry.

The architect who had charge of the alterations in the Suffolk County court house, authorized under the Acts of 1906, was engaged and he prepared for the Commission a carefully considered set of plans which would furnish fairly satisfactory accommodations for women jurors in the sixteen jury rooms in that building. These plans provide for the construction of suitable partitions, the installation of toilet facilities and in some instances provide separate retiring rooms for the women. It is true that the accommodations planned are modest, but they would make the service of women on juries possible and it is believed that more satisfactory accommodations could well wait until more satisfactory accommodations are furnished for men jurors.

Estimates secured from reliable contractors show that these alterations for sixteen jury rooms could be made at an approximate cost of $22,000.; or at a general average of about $1,500. per jury room. This figure corresponds very closely with the estimates received from some County Commissioners who furnished this Commission with the figures which it requested. As there are about seventy jury rooms in the court houses throughout the state, the Commission believes that existing court houses could be altered so as to accommodate women jurors at an approximate cost of from $100,000 to $150,000.

Respectfully submitted,

WALTER SHUEBRUK, *Chairman.*
MERLE D. GRAVES.[1]
M. SYLVIA DONALDSON.
T. HOVEY GAGE.[1]
THOMAS W. PROCTOR.[1]
EDITH M. HAYNES.
FREDERICK W. MANSFIELD.[1]

[1] For partial dissents see *infra*.

We dissent from that part of the foregoing report which recommends making women eligible for jury service.

T. HOVEY GAGE.
THOMAS W. PROCTOR.
FREDERICK W. MANSFIELD.

I dissent from that part of the foregoing report which recommends the use of metal discs in the drawing of jurors and from that part which recommends the appointment of an official to supervise the work of the local boards in their preparation of the annual jury lists.

MERLE D. GRAVES.

DISSENTING REPORT AS TO JURY SERVICE FOR WOMEN.

Voluntary jury service for women as recommended by a majority of the Commission is such a radical departure from the traditional policy of the Commonwealth that the minority who oppose it wish to present for the consideration of the Legislature the reasons for their dissent.

This Commission was established to examine the present jury system to the end that reforms and improvements might be suggested if the Commission should decide that they were needed. We take this to mean that the present jury system is not to be changed unless it can be shown that the change proposed would improve the jury service. Extending such service to women is a great change but that fact does not necessarily prove that the change if made, would be an improvement.

In approaching these questions all preconceived notions and opinions were laid aside and with open minds the Commission proceeded to hear testimony, suggestions and arguments. Full opportunity was given not only to all women, but to all persons favoring such a change, to appear and be heard. After all were heard who desired the opportunity it seemed to us that no convincing testimony or arguments had been advanced to indicate that extending jury service to women would improve the service. Nor had it been shown that women as a whole desired such service. It is easy enough to vote to extend jury service to include women but if such extension merely means multiplying the evils that we now have without gaining thereby any substantial benefits, what lasting good has been accomplished for the Commonwealth? Experience as shown by the practice in other communities was far from convincing. Merely because twenty-three states impose this duty upon women seemed to us to have no probative value whatever because that was more than offset by the twenty-five states where women do not serve as jurors. Plainly, if the law of twenty-three states can be urged as an argument in favor of this policy the opposing laws

of twenty-five states can be as strongly urged against it — more strongly perhaps, as they are in the majority.

To many of the men who addressed the Commission the notion of jury service for women was repugnant and it apparently struck some of them as a monstrous thing to compel women to serve as jurors against their will. Most of those speakers who favored the idea at all favored voluntary jury service. But the attitude of the women speakers was altogether different. They wanted nothing to do with a voluntary jury service, and were practically unanimous that jury service should be extended to women and that it should be compulsory. But this Commission voted against compulsory jury service for women by a vote of four to three as the majority report on this point discloses. One member of the Commission who voted with the majority on that question was of opinion that jury service ought to be extended to the women if it were made voluntary and not compulsory and that member voting with the three who were in favor of the compulsory system constituted the majority who voted for the voluntary system. We doubt very much if the most ardent supporters of jury service for women will be at all pleased with this result. Strange as it may seem we, who voted against extending jury service to women in any form, whether voluntary or compulsory, nevertheless agree with these most ardent advocates to this extent: while we are opposed to extending jury service to women in any form at this time yet we are unanimous in the belief that if women *are* to serve on juries such service should be compulsory and not voluntary.

We think that very serious consideration should be given to this question before the plan of voluntary service is adopted. The experienced trial lawyer will not hesitate to say that the juror who wants to serve is generally speaking the one who ought not to be allowed to serve. Suspicion might easily be directed to all such volunteers and the cautious trial lawyer, safeguarding the interests of his client, could hardly be blamed if he challenged every one of them. And if women are to be allowed to decide for themselves whether or not they shall serve as jurors we think the inevitable result will be that the vast majority of women will elect not to serve and that this ma-

jority would include the very women who would make the best jurors, and the minority who would elect to serve might be women who would not make desirable jurors.

And in this connection it may be noted that practically every advocate of jury service for women based her argument upon equality of the sexes, — that equal jury service was a natural result of equal suffrage. But where is the equality here? Rigid compulsion for men and easy election for women can hardly be called equality. Upon one sex a duty is imposed — to the other a privilege is extended.

At all of the hearings and during all our deliberations great attention has been given to the fitness of women for jury service but little if any to the fitness of jury service for women. A great many cases that are tried before juries — in civil courts as well as criminal — have repulsive features. They are repulsive to men and unless our fixed notions as to the superior refinement and delicacy of women are altogether mistaken, they would be more repulsive to women. Why any woman should yearn for this often disagreeable duty may well be a cause for wonder. It is no secret that most men would like to avoid jury service, if they could. Most of the women who addressed the Commission seemed to think jury service was a "right" to which women were entitled. But it is nothing of the sort. It is a civic duty which citizens are called upon to perform whether they like it or not, just as they are called upon to serve in the Army in time of war or National danger. As pointed out above it is often a disagreeable duty. Testimony may be revolting; exhibits may be gruesome; criminals of the most depraved type charged with crimes of the most degrading kind may be tried; cases may last for weeks and even months. In capital cases juries may be segregated from their homes, families and companions for days at a time. During deliberations on such cases the juries may be locked up all night. Instances of such unpleasant conditions may be multiplied without number. It well may give every good citizen pause before adopting a system which might subject mother, daughter, sister, or wife to such coarsening influences. And all for what? Merely to try an experiment. Most of the advocates of jury

service for women confined their remarks to criminal and domestic relations cases: but these are a small percentage of the business of our courts. No one urged that women had any aptitude for considering commercial or business questions. Indeed one of the leading proponents remarked that such cases ought not to be tried by a jury and the Commission was asked to recommend special juries for these cases. We do not believe a good housewife or mother has the inclination or capacity to sit during a long protracted trial of a purely commercial issue. We have enough jurors now. We have recommended changes in the law which will extend compulsory jury service to men whether on the voting list or not. If adopted this law will make available in Boston alone from fifty thousand to one hundred thousand men from whom jurors may be selected. It was openly stated at the meetings and probably will readily be accepted as true that many men of a superior intelligence, education and training do not become listed as voters in order to avoid jury service. If this is so a large portion of this new class of jurors will be of the very highest type unless their former avoidance of jury duty may be taken as an indication of a lack of fitness. We have jurors enough even now without such a change in the law, but if that change is made we can see no excuse whatever for compelling women to perform an odious task. Massachusetts has led the country (if not the world) in legislating to protect the health, morals and general welfare of women. Our statutes contain many provisions regulating their hours of labor, prohibiting night work, the moving or lifting of heavy weights, forbidding their employment for certain periods before and after childbirth, and the like. We suppose that these salutary laws were passed because it has been recognized by everyone that women differ from men; and despite the clamor of the most ardent contender for equal rights between the sexes the fact remains that women are, and always will be, different from men. It may seem strange that a Commonwealth which has striven so sincerely to protect women from physically unpleasant and arduous labor should be asked or advised to subject women to influences which are sure to be mentally unpleasant and are likely to be morally contami-

nating. The advocates of the measure gave little weight to any objections based upon the superior refinement of women, but we are old fashioned enough to believe that the chivalry which believes in protecting women from stain and contamination is still a potent force in Massachusetts.

The hearings conclusively showed two things — that the majority of men do not want jury service for women and that it was not claimed by its most ardent advocates that the majority of women wanted jury service for themselves. Those who expressed themselves as favoring such a law were hopelessly divided among themselves as to whether the service of women should be compulsory or voluntary. There was no clear call for any substantial body of either men or women for jury service for women — substantial we mean in the sense that anywhere near a majority of either men or women were in favor of it. Why then should such a fundamental change be considered seriously at this time?

And yet if we were satisfied that a majority of the women themselves wanted to serve on juries we would be inclined to give them the chance to do so notwithstanding our misgivings as to the practical advantage of such a step; and on the other hand if we were satisfied that extending jury service to women would improve the service we would favor it whether the women desired it or not — as the end which we are seeking is to improve the jury service. Whether women should be compelled or allowed to serve on juries is a matter in which the men in the Commonwealth are as vitally interested as the women. It is an innovation which changes the method by which generations of men have administered the law. The men ought to have a chance to express their views before such a radical change is adopted. The women ought to have a similar chance. Now that women have been granted full suffrage we suggest that this whole matter if it is possible under the law be left to the people to be decided by referendum. This suggestion did not meet with favor among the women advocates of the measure but since practically every one of them argued that equal jury service went with equal suffrage, it is hard to see how or why they should object to submitting the matter to be decided

by all of the people. We recommend that course, if it can be done. If that cannot be done because of the law concerning the referendum, we unhesitatingly recommend that jury service be confined to the men as it is now.

THOS. W. PROCTOR.
T. HOVEY GAGE.
FREDERICK W. MANSFIELD.

SUPPLEMENTARY REPORT AS TO JURY SERVICE FOR WOMEN.

The three members of this Commission whose names appear at the end of this report sincerely regret that they were unable to arrive at any agreement with Messrs. Gage, Proctor and Mansfield on the recommendations to be made to the Legislature regarding jury service for women. So sound and true have been the guidance and advice of these distinguished gentlemen and so indefatigable their zeal and industry throughout the proceedings of this Commission that we would doubt the soundness of our own conclusions were they anything less than positive convictions.

Nor let it be said that any thoughts of political preferment from women voters have urged our judgment; for he would indeed be gifted who could foretell whether women's favor or resentment will be the lot of those who advocate jury service for women.

Guided solely by a desire to reach conclusions in this matter which in our judgment are sound and right and in spite of the high regard in which we hold the opinions of our colleagues and our reluctance to differ with them, we believe and therefore recommend to the Legislature that jury service for women should be placed on the same basis as that of jury service for men. Of course, appropriate exemptions for women should be provided as appropriate exemptions for men are now provided.

It is true that we have voted for optional service for women and have signed the majority report recommending appropriate legislation. We voted for such legislation, however, not because we believed that it would be the correct solution but because we believed it would be a step in the right direction. The logic of such a position we cannot defend at all; our only justification for the position we take is that we incline to follow the proverbial advice that half a loaf is better than no bread at all. We believe that women should be made liable for service on

juries just as men are today; but optional service for women would be better than no service at all.

In the first place it should be noticed and carefully borne in mind that the majority report does not recommend "voluntary service", as stated in the minority report. Surely "voluntary service" means service by those who volunteer. The majority recommends nothing even remotely resembling service by women volunteers. On the contrary, it recommends that all women shall be made liable for jury service on the same basis as men, providing merely that any woman shall be exempted upon her own request. The use of the words "voluntary service" in the minority report can be justified only on the assumption that under a law providing for optional service all women would claim exemption except those who would volunteer for such service, if some system of voluntary service were in force. There is nothing to support any such assumption.

If we were to provide some system under which women could volunteer for jury service it may be true that some who volunteered would not on the whole make desirable jurors. The law recommended by the majority, however, would furnish our courts not with volunteer jurors, but with women who, having been drafted, were willing to serve — not willing because of idle curiosity and a desire to mix up in other people's business; but willing because they appreciate their duties and obligations to the community and are ready to assume the burdens as well as the benefits of their citizenship. There could be nothing in such willingness to alarm the experienced or the inexperienced trial lawyer. We are constantly striving in various ways to make men willing to serve and we can never secure the maximum of benefit from our jury system until all men are willing to serve when drafted. Certainly women who are willing to serve when drafted ought not to be open to suspicion more than men under similar circumstances. A "willing" juror, such as the majority recommendation would furnish, is entirely different from the "volunteer" juror which, agreeing with the minority, we are confident should be avoided.

Under an optional system it is unreasonable to question that some women "of sound judgment" "qualified to serve as

jurors" would serve. It would afford opportunities to those women who believe that they are not enjoying the full privileges of citizenship and to those women who believe that they are not performing the full duties of citizenship unless they serve on juries and it would afford an opportunity for the community to judge the quality of jury service to be expected from the women of Massachusetts. More valuable than anything, however, the novelty of seeing women on our juries would soon wear away; and with it the present impasse of conservatism, the dread of change and of anything new. Then, as in other states and countries where women serve equally with men on juries, we would wonder why they ever had been excluded and distinctions between men and women, so far as jury service is concerned, would be forgotten.

It is said that there is no probative value in the fact that twenty-three states (or twenty-four according to the evidence submitted to the Commission) already have jury service for women. In the bare statement there is perhaps no probative value; but we believe there is a great deal when attendant circumstances are considered. Practically every one of these states have adopted the change after years of juries composed exclusively of men; none have ever returned to the old system. So far as appeared no serious suggestion has ever been made in any of these states that women should once more be excluded from jury service. There can be no satisfactory method of learning whether the presence of women on the juries in these states has helped or hurt the system because this depends so largely on point of view, but the only evidence before the Commission was either that it has made no difference or that it has helped the system as a whole. There was not the slightest evidence that women have proved incompetent as jurors in those states; nor was there the least intimation that womanhood has lost any of its refinement, that chivalry is decadent or that women have been contaminated and stained by jury service in Maine, Vermont, New Jersey, Delaware, Pennsylvania, Ohio, Michigan, Indiana, Kentucky, Wisconsin, Louisiana, Arkansas, Missouri, Iowa, Minnesota, Kansas, North Dakota, Wyoming, Utah, Idaho, Washington, Oregon, Nevada and California.

Some of these states have had jury service for women for many years; all have it now.

When all the circumstances are considered we are disposed to think that the existence of jury service for women in twenty-three or twenty-four states has considerable probative value.

Judge Florence Allen of Ohio has said "Women from all classes come into the jury box. They are all eager to play their part in administering justice. They are more willing to serve than men. Educated women have more leisure unless they have young children, than business men, and, therefore, we find them less apt to evade jury duty than men of the same class. This means that in calling women to serve as jurors new sources of intelligence are opened and intelligence is surely needed on a jury. The women on the jury follow the evidence well and are usually conscientious in the verdict."

We do not share the apprehensions expressed by the minority regarding the system of optional service. Nevertheless we believe the Legislature should enact legislation removing all distinction between men and women, so far as jury service is concerned, except in the list of exemptions. Optional service is illogical and it would create a needless and an unjustifiable distinction between men and women, which would be as unfair to the men as to the women; it would permit the woman shirker to avoid jury service whereas we are constantly endeavoring to circumvent the male shirker.

Perhaps it is of little importance but our interpretation of the instructions contained in the Resolve by which this Commission was created is different from that of the minority. According to our understanding of the Resolve the Commission was requested to do three things: — investigate the jury system of the Commonwealth, investigate the question of making women eligible for jury service and investigate as to what alterations would be necessary in the court houses if women should be made eligible.

Undoubtedly it would be of some importance to discover, if possible, whether our jury system would on the whole be improved if women were made eligible. It seems to us, however, that there is nothing in the Resolve which would require the

Commission to report against jury service for women merely because it was not convinced that the jury system would be improved thereby.

In even a broader sense, however, it cannot fairly be said that there is any burden of proof resting on the proponents of jury service for women. Since the provincial period jurors have been selected in Massachusetts from those possessing the privilege of voting. The present law, G. L. ch. 234, section 1 says "A person qualified to vote for representatives to the general court shall be liable to serve as a juror." To the casual reader it would have appeared that the only burden of proof resting on the proponents of jury service for women would have been to demonstrate that women are persons. The Supreme Judicial Court, however, decided otherwise in an opinion which amounts practically to this; that it does not appear affirmatively that the Legislature in re-enacting the jury statute in 1921 by General Laws, Chapter 234, had in mind the suffrage amendment to the Federal Constitution of August 26, 1920 and that therefore there is nothing to indicate that the Legislature meant to include women when they said "persons". (Opinion of the Justices, 237 Mass. 591). The opinion recognizes, however, that citizenship, the right to vote, has always been in Massachusetts the test of liability for jury service.

We take issue with the minority when they say that jury service is not a "right". Jury service, in our opinion, is a "right" possessed by every citizen who is qualified. Even if we should agree with the minority that jury service is not a right or privilege but "a civic duty", still by what persuasion can we deny the opportunity to those who derive some satisfaction in performing their "civic duty"? Perhaps the distinction is of little importance for in this Commonwealth by all custom, practice and authority, jury service is at least an incident of citizenship. With entire propriety, doubts may still be entertained by conscientious and law abiding citizens as to the advantages or disadvantages secured to our body politic by the adoption of any one of the amendments to the Federal Constitution — the fourth or fifth, the eighteenth or the nineteenth. But, having adopted the nineteenth amendment, granting to women the rights and imposing upon them the duties of citizen-

ship, it is not, in our opinion, fair play to establish some new political distinction between male citizens and female citizens. Nor can we escape the dilemma by contending that jury service is not imposed upon all citizens but merely upon those who are considered qualified; for this would require us to say that jury service extends to all citizens except the incompetent, the irresponsible, the criminals, the physically defective, the insane — and women.

Citizenship — that is the test — male or female. Prior to August 26, 1920, our body politic was a society of men. Only men were citizens. On that date our body politic ceased to be a society of men. It became instead a society of men and women; and today is a society of men and women with citizenship equal and alike among men and women and with citizenship still constituting the peg on which our jury service hangs. Having acted fairly toward all citizens prior to August 26, 1920, by imposing jury service upon all citizens, we should act just as fairly after August 26, 1920, and continue to impose jury service upon all citizens or pull the peg of citizenship upon which our jury service hangs. There is no magic in dates; principle and the peg remain.

Surely fairness and logic require those who would substitute some new test to go forward and to sustain their case not merely by a fair preponderance of the evidence but by evidence which establishes their case beyond all possibility of doubt. This burden of proof opponents of jury service for women undertake to sustain; some by contending that women are not fit for jury service; others by contending that jury service is not fit for women.

The ranks of those who maintain that women are unfit for jury service are thinning fast. Not that there are few remaining who have the courage to say it if they believed it; but apparently, however many there may be who abhor the idea of having women serve on juries, hardly one remains that is not ashamed to say what he knows is not true — that women are not fit, physically, mentally, temperamentally, for jury service.

Perhaps it may be said that new duties and responsibilities are crowding in upon the women so rapidly that we should

pause awhile so that they may assimilate what they have acquired. So far as we can discover there is nothing to cause any apprehension in this regard; in all walks of life, business, professional, social, political, experience would seem to justify us in concluding that women have adapted themselves to new conditions with the greatest ease and are today citizens in fact and not in name only.

Of course, it cannot seriously be contended that women are unfit for jury service because of lack of experience in jury service. Such an attitude would present a rather serious obstacle to any movement for progress or change.

For the practically minded opponents of jury service for women, there is really only one refuge left; that jury service is not fit for women. This is a difficult question to approach because it is all so indefinite and vague.

The most common, probably because the most obvious, method of approach is to point out that jury service may often be disagreeable, "that testimony may be revolting, exhibits may be gruesome, criminals of the most depraved type charged with crimes of the most degrading kind, may be tried." "In capital cases juries may be segregated from their homes, families and companions for days at a time. During deliberations on such cases the juries may be locked up all night. Instances of such unpleasant conditions may be multiplied without number."

To seize thus upon the capital or salacious or gruesome case is to overlook as fit subject matter the vast majority of unobjectionable criminal and civil cases and to test fitness of jury service for women by a special subject matter presented by a small percentage of class cases only. This, of course, narrows greatly the point of approach. Accepting the matter of jury service as thus presented, however, are we not ready to continue to rely on sound judgment and goodness of moral character? In the first place it must be borne in mind that we would not be dealing with Massachusetts women as a mass, but only with selected Massachusetts women, those who have been selected not at random, but with care as sound and good in mental and moral respects. Would we not be justified in assuming that soundness and goodness would persist with selected women

as much as with selected men? To say that chance contact with a few special cases for a limited period and at intervals of three years will besmirch the womanhood or enfeeble the mentality and morality of Massachusetts women selected especially for mentality and morality is to have little faith in the stamina and fiber of the best womanhood in the Commonwealth; is to show little confidence in the character of our mothers, daughters, sisters or wives.

If, however, some feel that the besmirching would result inevitably from any contact in such cases, exemption could be made similar to that provided in England by the Sex Disqualification Act of 1919 which provides "(B) Any judge . . . may, on an application made by a woman to be exempted from service on a jury in respect of any case by reason of the nature of the evidence to be given or of the issues to be tried, grant such exemption."

Passing then to the surroundings in our court houses, of course, we must admit that these surroundings can be improved and that requirements of association can somewhat easily be provided for by partitions, separate quarters in hotels and other proper arrangements. The preservation of a litigant's rights does not mean that jurors must never lose sight of one another.

Certainly protection for the woman citizen in her contacts would be present in a Massachusetts court or jury as much as in any respectable body. To say it would not is to consider our courts and juries lacking in respectability and not likely to accord to women in court and jury surroundings the same degree of respect accorded to her in other respectable surroundings. So to treat our courts and juries is unfair and unwarranted. Our judges, court officers and jurors have sound elements of decency; dignity and manhood are still present among them.

If precedent is to have any weight in determining the probable nature and effect of court and jury influence upon supposedly sound, mental and good moral Massachusetts women, most superficial study should convince us that of all countless court and jury influences, different in every case, acting differently upon different individuals and with no two cases or individuals the same, all are not coarsening and all fairly to be termed

coarsening do not coarsen. Of such influences, rather many are educative, some actually uplifting and few indeed fail to emphasize somebody's respect for law and order in an atmosphere not redolent of whiskey, tobacco smoke and filth, but ordinarily of sound appeal to principle, reason and precedent.

With the utmost respect and in all sincerity we submit that if motives and inclinations could be analyzed we would discover that the opposition to jury service for women has really no sounder basis than the unanswerable reason "because."

It would be something new for Massachusetts; members of the bar and especially trial lawyers whose training has been built on years of experience with men juries would find an unknown element to deal with; court officers would find different conditions and the atmosphere of the courts would be changed; men jurors might find some of their liberties and masculine privileges curtailed. All these things, however, are but details and would soon be forgotten in the changing order. The innovation was made in August, 1920, when women were made citizens; we believe that the innovation should be accepted as an accomplished fact and in its entirety and that we should govern ourselves accordingly.

There is some evidence that a majority of the men do not want women on the juries; possibly if it were borne home to the men that jury service for women would approximately halve the liability of the men for jury service the evidence might all be the other way. Whether men want jury service for women, however, has absolutely nothing to do with the question. It is a question to be determined by the citizens of the Commonwealth or their representatives and not by the male citizens alone.

Similarly, it is beside the question to argue that the majority of women do not want jury service for women. There is little reason to believe that this is true; but even if it is, it certainly is equally true that the majority of men, if they were asked whether they wanted to serve on a jury, would answer "no."

Of course, there can be no objection to having all of the people pass on the question as suggested in the minority report.

In this suggestion we join heartily with the minority and

therefore recommend legislation making women eligible for jury service on the same basis as men, thus at least affording an opportunity for the people themselves to pass upon the question.

Respectfully submitted,

WALTER SHUEBRUK.
EDITH M. HAYNES.
MERLE D. GRAVES.

SUPPLEMENTARY REPORT AS TO JURY SERVICE FOR WOMEN.

It is self-evident that this Commission had two distinct duties to perform. The report of the Commission on its "Investigation of Jury Service in the Courts of the Commonwealth" is unanimous, except as above noted.

The other subject — "The Making of Women Eligible for Jury Service" is so marked a departure from the principles of procedure of this Commonwealth that this Commission is unable to arrive at a unanimous conclusion and is therefore compelled to present a minority report together with a doubtful majority report.

Be it understood, however, that this is not because any one or several members desire to cling to obsolete policies — if such there be — but, rather, that each has his or her own unbiased opinion, resulting from careful study and investigation, from consultation with the highest authorities, from personal experiences, and from the proponents and opponents of this measure who have desired to be heard.

It has been found possible to group the Commission into three classes. First, those who were absolutely opposed to jury service for women; Second, those who favored compulsory jury service for women; Third, those who would have women eligible for jury service, but it should be *non-compulsory*.

I am free to confess that this last is my attitude with regard to "Jury Service for Women"; and let it be said, in passing that "*non-compulsory*" service is quite different from "voluntary service." In the former instance, women whose names are to be placed on the jury list are to be selected with the same care and attention as are men whose names are accepted, and so placed. If after her name has been placed on the jury list any woman desires to be excused this privilege is to be given her. "Voluntary service" implies that a woman may offer her services, or state her willingness to serve as a juror.

Non-compulsory service for women is the method employed

in twelve or more of the states of this country and it is also the law in England.

No one, any longer, questions the fitness of a woman of "sound judgment and good moral character" to serve on a jury; but the preponderance of evidence is to the effect that there is a question about the fitness of jury service for these same women who measure up to the requirements of the statutes.

If, as has been stated to the Commission, there is a large number of women who are desirous of rendering this service to the state; who are claiming it as a right or a duty, this "non-compulsory" method will afford such women an opportunity for such service.

On the other hand, there is an equally large number who contend that jury service is no more a duty than is the exercise of suffrage, and to whom jury service is revolting in the extreme. This method will give to such women the privilege of being excused.

In my opinion there are three kinds of citizen service wholly unfit for women, viz.: military service, police service and jury service.

The arguments advanced in favor of jury service for women, apply equally well to either of the other two; and, yet, I am of the opinion, that most women, and men likewise, would hesitate about making military or police service compulsory for women.

Given a fair trial with the suggested privileges of exemption, it may be that "jury service for women" will grow in popular favor and prove to the now doubting ones, that it is the bulwark of the system, and no further "investigations" will be necessary.

M. SYLVIA DONALDSON.

APPENDICES

APPENDIX "A."

The Commonwealth of Massachusetts

IN THE YEAR NINETEEN HUNDRED AND TWENTY-FOUR.

AN ACT MAKING CERTAIN CHANGES IN THE LAWS RELATIVE TO JURIES.

Be it enacted, etc., as follows:

SECTION 1. Section one of chapter two hundred and thirty-four of the General Laws, as amended by section one of chapter four hundred and thirteen of the acts of nineteen hundred and twenty-three, is hereby further amended by inserting after the word "court" in the second line the following: —, whether a registered voter or not, — by striking out, in the sixth line, the words "during a session of the general court", — and by striking out, in the sixteenth line, the words "sixty-five years of age; members" and inserting in place thereof the following: — seventy years of age; persons under twenty-five years of age; commissioned officers, — so as to read as follows: — *Section 1.* A person qualified to vote for representatives to the general court, whether a registered voter or not, shall be liable to serve as a juror, except that the following persons shall be exempt:

The governor; lieutenant governor; members of the council; state secretary; members and officers of the senate and house of representatives; judges and justices of a court; county and associate commissioners; clerks of courts and assistant clerks and all regularly appointed officers of the courts of the United States and of the commonwealth; registers of probate and insolvency; registers of deeds; sheriffs and their deputies; constables; marshals of the United States and their deputies, and all other officers of the United States; attorneys at law; settled ministers of the gospel; officers of colleges; preceptors and teachers of incorporated academies; registered practicing physicians and sur-

geons; persons over seventy years of age; persons under twenty-five years of age; commissioned officers of the volunteer militia; superintendents, officers and assistants employed in or about a state hospital, insane hospital, jail, house of correction, state industrial school or state prison; keepers of lighthouses; conductors and engine drivers of railroad trains; teachers in public schools; enginemen and members of the fire department of Boston, and of other cities and towns in which such exemption has been made by vote of the city council or the inhabitants of the town, respectively.

SECTION 2. Said chapter two hundred and thirty-four is hereby further amended by striking out section two and inserting in place thereof the following: —

Section 2. A person attending and serving as a juror in any court in pursuance of a draft shall not again serve as a juror until after the expiration of the three succeeding court years. For the purposes of this section the words "court year" shall mean the year for which the jury list is prepared.

SECTION 3. Said chapter two hundred and thirty-four, as amended in section three by section two of chapter four hundred and fifty-five of the acts of nineteen hundred and twenty-one, is hereby further amended by striking out said section three and inserting in place thereof the following: —

Section 3. A person who has served as a traverse juror for twenty days at any sitting of the court may, at his request, be excused from further service except to finish a case commenced within that time.

SECTION 4. Said chapter two hundred and thirty-four is hereby further amended by striking out section four and inserting in place thereof the following: —

Section 4. The board of election commissioners in cities having such boards, the board of registrars of voters in other cities and the board of selectmen in towns, shall annually before July first prepare a list of such inhabitants of the city or town, qualified as provided in section one, of good moral character, of sound judgment and free from all legal exceptions, not exempt from jury service under section one or two, as they think qualified to serve as jurors. The board shall not place the name of any person on said list unless such person is determined to be qualified as aforesaid upon the personal knowledge of one of its members, or after personal appearance and, if the board deems it necessary, examination under oath. The board may summon persons to

appear before it for examination as to their qualifications for jury service and may compel their attendance before it and the giving of testimony in the same manner and to the same extent as may magistrates authorized to summon and compel the attendance of witnesses. Such examinations may be held before a single member of the board and each member may administer oaths. If the board elects, such examination may be in the form of a questionnaire to be answered under oath. The board may further investigate by inquiries at such person's place of residence and business or employment, or by other means, his reputation, character and fitness for such service. The chief of police or the police commissioner or the official having charge of the police shall upon request give the board all possible assistance in making such investigation. Upon the request of the board or any member thereof, any person shall answer all questions and give such information as he may have relating to the character or fitness for jury service of any person concerning whom such request is made, which information shall be confidential. To the name of each juror on said list shall be appended his place of residence and of business or occupation, the kind of work he is engaged in and the name and business of his employer, if any. Each such name shall be numbered consecutively on said list and the number so given each such name shall appear on said list opposite thereto. Such list shall include not less than one juror for every hundred inhabitants nor more than one for every sixty according to the latest census, state or national, but in Nantucket and Dukes counties it may include one for every thirty inhabitants. In no event shall a person's name appear on the jury lists of more than three successive years or on more than three jury lists in any six year period. As soon as may be after a person is listed under this section, the board shall notify such person by mail that he is on the jury list and is liable to be called for jury service during the next twelve months.

If any question concerning the preparation of such list arises, as to which the board of election commissioners, registrars or selectmen are equally divided, it shall be referred in Boston to the chief justice of the municipal court of the city of Boston, or, in case of his absence or disability, to the senior justice thereof, and in other cities and in towns to the justice of the district court within whose jurisdiction such city or town lies, or in case of his absence or disability to the senior associate justice thereof, and his decision on the question shall be final.

Failure by a registrar of voters or election commissioner to comply with the requirements of this section shall be sufficient ground for his removal from office.

SECTION 5. Said chapter two hundred and thirty-four is hereby further amended by striking out section five and inserting in place thereof the following: —

Section 5. Jury lists prepared as above provided shall annually, before August first, be printed with the place of residence and of business or occupation of each juror and the kind of work he is engaged in and the name and business of his employer, if any, and the number given as aforesaid, and a copy thereof shall be delivered to the special deputy in the department of the state secretary, to the mayor or selectmen and to the clerk of the city or town to which such list relates, and to the clerks and assistant clerks of the supreme judicial and superior courts in the county where such city or town is situated, to be kept by said clerks and assistant clerks for the use of said courts.

SECTION 6. Said chapter two hundred and thirty-four is hereby further amended by striking out section seven and inserting in place thereof the following: —

Section 7. The aldermen or selectmen shall procure circular discs of aluminum or other suitable metal, of uniform size and not less than one inch in diameter, to a number equal to the number of names contained on said jury list and each of such discs shall be numbered consecutively by stamping or impressing the number thereon. They shall place the discs bearing numbers corresponding to the numbers of the names on said list in a receptacle, in this chapter called the jury box, of sufficient capacity to enable them to be thoroughly shaken and mixed, kept by the city or town clerk for that purpose. The jury box shall be kept locked, except when required to be opened in order to carry out the provisions of this chapter.

SECTION 7. Section eight of said chapter two hundred and thirty-four is hereby amended by striking out, in the first and second lines, the words "whose name has been so placed in the jury box" and inserting in place thereof the words: — who has been drawn and returned to serve, — and by adding at the end thereof the following: — In every instance in which a juror is so relieved or a juror's name is ordered to be stricken from said list the clerk of the court shall report the same to the special deputy mentioned in section five, — so as to read as follows: —

Section 8. If a person who has been drawn and returned to serve

is convicted of a scandalous crime or is guilty of gross immorality, or is found by the justice holding court to be unqualified or unfit to serve as a juror, he may be relieved by said justice from sitting in any case, or his name ordered by the justice to be stricken from the jury list. In every instance in which a juror is so relieved or a juror's name is ordered to be stricken from said list the clerk of the court shall report the same to the special deputy mentioned in section five.

SECTION 8. Said chapter two hundred and thirty-four is hereby further amended by striking out section nine and inserting in place thereof the following: —

Section 9. The jury lists in cities shall be published as a public document and in towns shall be published in the annual town report. In lists published under this section there shall be appended to the name of each juror, his place of residence and of business or occupation, the kind of work he is engaged in and the name and business of his employer, if any.

SECTION 9. Section seventeen of said chapter two hundred and thirty-four is hereby repealed.

SECTION 10. Said chapter two hundred and thirty-four is hereby further amended by striking out section eighteen and inserting in place thereof the following: —

Section 18. If jurors are to be drawn in a city, the mayor and city clerk shall meet with the aldermen at its regular place of meeting. The discs in the jury box shall be shaken and mixed and one of the aldermen, designated by the mayor, shall, without seeing the numbers thereon, openly draw out discs one by one until the number of jurors required is completed. He shall announce clearly and distinctly the number on each disc as drawn, and shall then hand the disc to the mayor, who shall examine it and verify the number thereon. The mayor shall then hand the disc to the city clerk, who shall announce clearly and distinctly the name on the jury list corresponding to the number on said disc, and the proceedings shall be further carried on as provided in sections twenty and twenty-one. In the absence of the mayor, the chairman or president of the board of aldermen shall perform the duties required of the mayor by this section.

SECTION 11. Section nineteen of said chapter two hundred and thirty-four is hereby amended by striking out the last sentence and inserting in place thereof the following: — The discs in the jury box shall be shaken and mixed and one of the selectmen, without seeing the numbers thereon, shall openly draw

out discs one by one until the number of jurors required is completed, — so as to read as follows: — *Section 19.* When jurors are to be drawn in a town, the town clerk and selectmen shall meet at the clerk's office or at some other public place appointed for the purpose, and, if the clerk is absent, the selectmen may proceed without him. The discs in the jury box shall be shaken and mixed and one of the selectmen, without seeing the numbers thereon, shall openly draw out discs one by one until the number of jurors required is completed.

SECTION 12. Said chapter two hundred and thirty-four is hereby further amended by striking out section twenty and inserting in place thereof the following: —

Section 20. If a person draw as provided in the two preceding sections is unable by reason of illness or absence from home to attend as a juror, the disc bearing the number given to him as aforesaid shall thereupon be returned to the jury box and another drawn.

SECTION 13. Said chapter two hundred and thirty-four is hereby further amended by striking out section twenty-one and inserting in place thereof the following: —

Section 21. If a person drawn as provided by section eighteen or nineteen is exempt under section one or two, there shall be noted on the records the reason for his exemption and the disc bearing his number shall be deposited in another receptacle and another disc drawn. If a person is drawn and returned to serve as a juror in a court, the selectmen or the city clerk, respectively, shall note on the records the date of the draft and shall deposit the disc bearing his number in said receptacle. Said receptacle shall be kept by the city or town clerk for the aforesaid purposes. It shall be provided with a slot in the top through which shall be deposited any discs required by this section to be deposited therein, and it shall be kept locked except after the preparation of a new jury list when it becomes necessary to take out the discs therein in order to comply with section seven and except when the special deputy mentioned in section five desires to inspect the receptacle or the discs therein. All proceedings under this and the three preceding sections shall be recorded and shall be published if and when such records are published officially. Such original records shall be open to inspection by said special deputy.

SECTION 14. Section twenty-three of said chapter two hun-

dred and thirty-four is hereby amended by striking out, in the second line, the word "seven" and inserting in place thereof the word: — seventeen, — so as to read as follows: — *Section 23.* The meeting for drawing jurors shall be not less than seventeen nor more than twenty-one days before the day when the jurors are required to attend.

SECTION 15. Section twenty-four of said chapter two hundred and thirty-four is hereby amended by striking out, in the first line, the word "four" and inserting in place thereof the word: — fourteen, — so as to read as follows: — *Section 24.* The constable shall, fourteen days at least before the time when the jurors are required to attend, summon each person who is drawn, by reading to him the venire with the endorsement thereon of his having been drawn, or by leaving at his place of abode a written notice of his having been drawn and of the time and place of the sitting of the court at which he is required to attend, and shall make a return of the venire with his doings thereon to the clerk of the court, before the sitting of the court by which it was issued.

SECTION 16. Section twenty-five of said chapter two hundred and thirty-four is hereby amended by striking out the first sentence and inserting in place thereof the following: — On the day when jurors are summoned to attend at court for the trial of civil or criminal cases, except capital cases, the clerk of the court shall cause the name of each person so summoned, with his place of residence and of business or occupation, the kind of work he is engaged in and the name and business of his employer, if any, as they appear on the printed jury list, to be written on separate ballots, substantially of uniform size, and shall cause them to be placed in a box provided therefor, — so as to read as follows: — *Section 25.* On the day when jurors are summoned to attend at court for the trial of civil or criminal cases, except capital cases, the clerk of the court shall cause the name of each person so summoned, with his place of residence and of business or occupation, the kind of work he is engaged in and the name and business of his employer, if any, as they appear on the printed jury list, to be written on separate ballots, substantially of uniform size and shall cause them to be placed in a box provided therefor. When a case is ready for trial the clerk in open court, after shaking the ballots thoroughly, shall draw them out in succession until the names of twelve are drawn who appear and are not

excused or set aside. The twelve men so drawn shall be duly sworn and impanelled and shall be the jury to try the issue, and one of them shall be appointed foreman by the court. The ballots containing names of the jurors so sworn shall be kept apart by the clerk until the verdict of such jury has been recorded or such jury has been discharged, when such ballots shall be returned to the box. If a case is ready for trial before the verdict in the preceding case has been recorded or the jury discharged, the court may order a jury for the trial of such issue to be impanelled by the drawing in the manner aforesaid of ballots from those remaining in the box.

SECTION 17. Section thirty-seven of said chapter two hundred and thirty-four is hereby amended by inserting after the word "voters" in the first line the words: — , a selectman, — so as to read as follows: — *Section 37.* Whoever, being a registrar of voters, a selectman or an election commissioner, shall put or cause to be put upon the jury list the name of any person for any reason other than his judgment in good faith of the qualifications and fitness of such person for such jury service shall be punished by a fine of not more than five hundred dollars or imprisonment in the jail or house of correction for not more than one year.

SECTION 18. Said chapter two hundred and thirty-four is hereby further amended by striking out section thirty-eight and inserting in place thereof the following: —

Section 38. Whoever solicits or requests a registrar of voters, an election commissioner or a selectman to put his own or any other name upon a jury list shall be punished by a fine of not more than five hundred dollars or imprisonment in a jail or house of correction for not more than one year. Whoever solicits or requests a registrar of voters, an election commissioner or a selectman to strike from or keep off a jury list his own or any other name, unless he or such other person is legally exempt under section one or two or is physically incapacitated or is absent from the state, shall be punished by a fine of not more than five hundred dollars or imprisonment in a jail or house of correction for not more than one year.

SECTION 19. Said chapter two hundred and thirty-four is hereby further amended by striking out section forty-one and inserting in place thereof the following: —

Section 41. Whoever is guilty of fraud in the drawing of jurors either by tampering with the jury box previous to the draft or

in drawing a juror, or in returning to the box the disc bearing a juror's number lawfully drawn out and drawing or substituting another in its stead, or in striking a name from a jury list, or in keeping a name off the jury list, or in any other way, shall be punished by a fine of not more than five hundred dollars. Whoever, being an official upon whom any duty is placed by the provisions of this chapter, does anything in violation of said provisions or omits to do anything required by said provisions shall, unless some other penalty is provided, be punished by a fine of not more than five hundred dollars.

SECTION 20. Section twenty-five of chapter two hundred and sixty-two of the General Laws is hereby amended by striking out the first two sentences and inserting in place thereof the following: — The compensation of traverse jurors impanelled to try cases of murder in the first degree shall be six dollars, and that of all other traverse jurors and of grand jurors five dollars, for each day's service. All jurors shall receive for each day of actual attendance four cents a mile for travel out and home, — and by striking out, in the seventh line, the word "week" and inserting in place thereof the word: — day, — so as to read as follows: — *Section 25.* The compensation of traverse jurors impanelled to try cases of murder in the first degree shall be six dollars, and that of all other traverse jurors and of grand jurors five dollars, for each day's service. All jurors shall receive for each day of actual attendance four cents a mile for travel out and home. If the expense of a juror who attends court, necessarily and actually incurred for transportation out and home once in each day, exceeds the amount of the said allowance for travel, he shall be allowed the amount of such expense in lieu of the said travel allowance. If a grand or traverse juror is required to be in attendance for five or more consecutive days he shall receive his fees not later than the end of every fifth day of such attendance.

SECTION 21. Chapter nine of the General Laws is hereby amended by inserting after section ten the two following new sections: —

Section 10A. There shall be in the department of the state secretary a special deputy, who shall be appointed by the governor with the advice and consent of the council for five year terms, at a salary of dollars. He may employ such clerical assistance as his work may require.

Section 10B. He shall see that the laws and regulations relative to the preparing of jury lists and the drawing of jurors are strictly carried out and shall call to the attention of any of the boards charged with any duties relative to the same, irregularities relative to the carrying out of said laws and regulations. He may visit any city or town, inspect the work of such boards and give them such information as will tend to eliminate such irregularities and produce uniformity in the manner of preparing jury lists and drawing jurors throughout the commonwealth. Upon his request, such boards and clerks of courts shall give to him such information as may be necessary to enable him to carry out his duties under this section. He shall give his opinion to such boards upon any question arising under any statute relating to the preparation of jury lists and drawing of jurors and may obtain the opinion of the attorney-general upon such questions. He shall have power to call to the attention of any court the names of any unfit jurors that may have come to his attention in the course of his duties or otherwise. He shall file with the general court an annual report of the work done by him, together with any recommendations that he may have relative to the preparing of jury lists and the drawing of jurors.

SECTION 22. Section one of chapter two hundred and seventy-seven of the General Laws is hereby amended by striking out, in the second line, the word "seven" and inserting in place thereof the word: — twenty-four, — so as to read as follows: — *Section 1.* The clerk of the courts for each county, except Suffolk, shall, not less than twenty-four nor more than thirty days before the commencement of the first sitting of the superior court for criminal business in each year, issue writs of venire facias for twenty-three grand jurors to be returned to that court, who shall serve until the first regular sitting in the year next after they have been impanelled and until another grand jury has been impanelled in their stead. In counties where sittings of the court are established for the transaction of criminal business, they shall be required to attend only at such sittings.

SECTION 23. Section two of said chapter two hundred and seventy-seven is hereby amended by striking out, in the second line, the words "seven nor more than fourteen" and inserting in place thereof the words: — twenty-four nor more than thirty, — so as to read as follows: — *Section 2.* The clerk of the superior court for criminal business in Suffolk county shall, not less than

twenty-four nor more than thirty days before each sitting commencing on the first Mondays of January and July, issue writs of venire facias for twenty-three grand jurors to serve in said court, twenty-two of whom shall be drawn and returned from Boston, and one from Chelsea, Revere or Winthrop, who shall serve for each sitting thereof for six months and until another grand jury has been impanelled in their stead.

SECTION 24. The provisions of this act shall not take effect until September first, nineteen hundred and twenty-five, except that the provisions relative to the preparation of jury lists shall take effect in season to be availed of in the preparation of the nineteen hundred and twenty-five jury lists.

APPENDIX "B."

AN ACT RELATIVE TO THE SERVICE OF WOMEN ON JURIES.

SECTION 1. Section one of chapter two hundred and thirty-four of the General Laws, as amended by section one of chapter four hundred and thirteen of the acts of nineteen hundred and twenty-three, is hereby further amended by adding at the end thereof the following new paragraph: —

Except as otherwise provided in section twenty-four A, women shall be liable to serve as jurors to the same extent, and subject, so far as applicable, to the same exemptions, as men.

SECTION 2. Said chapter two hundred and thirty-four is hereby further amended by inserting after section twenty-four the following new section: —

Section 24A. Any woman desiring to be excused from jury service may claim exemption by signing a written or printed notice thereof and returning the same to the sheriff before the date for appearance, and if exemption is so claimed by reason of sex no appearance need be made in answer to said summons; provided, that the person summoning a woman for jury duty shall inform her of the provisions of this section and shall furnish her with a written or printed blank on which to make such claim for exemption.

SECTION 3. On or before October first, nineteen hundred and twenty-five, the county commissioners or other officers having the custody of court houses in which jury sessions are held shall provide adequate accommodations therein for women jurors.

SECTION 4. Section one shall not take effect until after the preparation of jury lists for the year nineteen hundred and twenty-four.